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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In The

Supreme Court of the United States

L.A. on their own behalf and as parents of M.A.,
G.A. on their own behalf and as parents of M.A.,

Petitioners,

v.

GRANBY BOARD OF EDUCATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

LISA H. ANDERSON, *pro se*
GORDON N. ANDERSON, *pro se*
19 Kearns Drive
Granby, CT 06035
(860) 653-5133

Petitioners

QUESTIONS PRESENTED

The petitioners are parents who seek reimbursement of attorneys' fees and costs under IDEA. 20 U.S.C. §1415(i)(3)(B)(i)(I). They have bounced between district court and federal appellate court for over five years now, incurring injury and liability, and recovering nothing. The purpose of the fees provision in IDEA is to enable parents or guardians of disabled children, for whom the statute was enacted, to effectuate the rights provided by the statute. This Court is the "court of last resort" for these parent-petitioners.

Questions presented:

Whether the court of appeals erred or abused its discretion in dismissing appeal #07-4329-cv.

Whether the respondent must reimburse the petitioners for attorneys' fees and costs related to the due process and federal court proceedings.

Whether the respondent will be sanctioned for willfully protracting this federal litigation.

PARTIES TO THE PROCEEDING

Petitioners are Lisa H. Anderson and Gordon N. Anderson, who are proceeding on their own behalf and as parents of M.A. The respondent is the Granby Board of Education of Granby, Connecticut.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Lisa H. Anderson and Gordon N. Anderson, on their own behalf and as parents of M.A., respectfully petition for a writ of certiorari to review case #07-4329-cv in the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Second Circuit (App. 1) is unreported. The order of the United States District Court for the District of Connecticut (S.App. 53) is unreported, and is part of case #3:03-cv-1695 which is sealed from public inspection. The Summary Order of the United States Court of Appeals for the Second Circuit for case #05-4168-cv (consolidated with case #05-6315-cv) (App. 45) is available at http://www.ca2.uscourts.gov. The Final Decision and Order #02-295 of the State of Connecticut Department of Education (App. 5) is reported at http://www.sde.ct.gov/sde/lib/sde/PDF/DEPS/Special/Hearing_Decisions/2002/02_295.pdf.

STATEMENT OF JURISDICTION

The court of appeals dismissed the appeal on October 10, 2008. (App. 1) The court of appeals denied the petition for rehearing and petition for rehearing

en banc on December 10, 2008. (App. 58) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 1415(i)(3)(A) of the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, provides:

> In general the district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

Section 1415(i)(3)(B)(i)(I) provides:

> In general in any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to a prevailing party who is the parent of a child with a disability.

STATEMENT

Since filing the complaint in 2003, the petitioners (the parents) have obeyed every court order, met every court deadline, and proceeded without requesting extensions of time, or permission to amend filings. The *pro se* parents have worked diligently to secure a just, and efficient resolution of this litigation. The board, on the other hand, has missed most deadlines,

and sought many filing extensions. (Civil Docket, S.App. 1) (General Docket, App. 60). And the board failed, all together, to respond to the motion for summary judgment that should have resolved this suit in 2004.

The board went on to lose the appeal that the parents filed in the United States Court of Appeals (Summary Order, App. 45), and upon remand to district court, missed the deadline for filing their status report. The parents appealed a second dismissal in district court, and timely-filed the appellant brief. The board failed, all together, to file the appellee brief.

The court of appeals dismissed the appeal (App. 1) on jurisdictional grounds that were suggested in the board's motion to dismiss. (App. 95) The order of dismissal was conspicuous in its brevity. It made no mention of the parents' brief nor that the parents had opposed the board's motion to dismiss. The court of appeals issued neither opinion nor summary order.[1]

The parents' petition for rehearing and rehearing *en banc* was denied in one sentence, with no mention

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[1] Disposition by Summary Order is permitted under Second Circuit Local Rule 32.1(a) which states, "The demands of contemporary case loads require the court to be conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by an opinion (i.e., a ruling having precedential effect), the ruling may be by summary order instead of by opinion."

of which judges voted, or how the judges voted. (App. 58)

Despite the parents having prevailed in a prior appeal to the same appellate court, and despite a different panel of judges in the United States Court of Appeals having issued a detailed summary order in their favor, the parents saw no indication during the second appeal that the prior case (05-4168-cv, App. 45) had been read. And there was no indication that their submissions to the court, the record on appeal, or any detail specific to the case at hand, had been considered.

The 3-judge panel that decided in favor of the parents in the first appeal voiced concern about the underlying proceedings saying,

> "The magistrate's September Report and the district court's October acceptance of that report must be vacated, as they were entered after the case had been dismissed and after the appeal filed. . . . We admit to being troubled by the September Report and October Order as it should have been apparent to both the magistrate and the district judge that they no longer had jurisdiction over this matter." (App. 53)

Once again, as the second appeal, #07-4329-cv, proceeded, the district court continued to issue orders in case #3:03-cv-1695 below, seeming unconcerned about whether or not the court had jurisdiction to make the orders. (Civil Docket, entries 66,73,74,75,78, S.App. 9-12) The parents have complied with the orders, only

because they desire at all times to be compliant with orders of the court. However, the petitioners are fearful that the latest orders portend an unfavorable disposition or lengthy protraction of proceedings upon any possible remand to district court. The parents believe imminent harm may likely result upon remand, because the district court had placed a $65,000 *lis pendens* attachment to the family's residence as part of the first improper dismissal of their IDEA claims.

A. Statutory Framework[2]

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, provides federal grants to States for assistance in the education of children with disabilities. Under the IDEA, a State participating in the grant program must ensure that each child with a disability receives a "free appropriate public education" (FAPE), which includes special-education and related services necessary to meet the child's particular needs. 20 U.S.C. §1400(d)(1)(A) & 1412(a)(1)(A). Local school systems are required to develop an individualized education program (IEP) for each child with a disability in accordance with statutory requirements. See 20 U.S.C. §1412(a)(4).

The heart of the IDEA system, however, is the set of procedural safeguards that states and localities are

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[2] *Winkelman v. Parma City School District*, 550 U.S. ___ (2007), Petition for Writ of Certiorari pages 3-4.

required to accord to "children with disabilities and their parents" in order to ensure the provision of a FAPE. 20 U.S.C. §1415(a); *see also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205-06 (1982) ("Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, * * * as it did upon the measurement of the resulting IEP against a substantive standard."). "Parents and guardians play a significant role in the IEP process." *Schaffer v. Weast*, 126 S.Ct 528, 532 (2005). For example, parents are given access to all relevant records, *see* 20 U.S.C. §1415(b)(1)(A), and parents must be given full written notice in advance of any change (or refusal to change) a child's education services, *see* 20 U.S.C. §1415(b)(3).

If parents are not satisfied with the IEP offered by their local education agency, they can file a complaint with the State or local educational agency, and they are entitled to "an impartial due process hearing" conducted "by the State educational agency, or by the local education agency." 20 U.S.C. §1415(b)(6) and (f)(1). Among other procedural safeguards at the hearing, parents have the "right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities * * * [and] the right to present evidence and confront, cross-examine, and compel the attendance of witnesses." 20 U.S.C. §1415(h). "Any party aggrieved" by a decision at the

final state administrative stage has a right to "bring a civil action with respect to the complaint" in federal district court or "any State court of competent jurisdiction." 20 U.S.C. §1415(i)(2)(A).

Ultimately, as this Court stated in *Rowley*, parental involvement is the key to the enforcement of the statutory scheme. "[P]arents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled under the Act," by participating in the formulation of their child's IEP and by undertaking the complaint procedures, beginning with the administrative process and culminating, in appropriate cases, in proceedings in federal court. *Rowley*, 458 U.S. at 182 & n.6, 207, 208-09.

B. Factual and Procedural Background

The petitioners' (the parents) son was in first grade when in April 2001 his parents requested that he be evaluated for developmental delays and learning disabilities due to difficulties with reading, spelling and writing. The respondent board of education (the board) convened a team meeting and the parties did not agree on the evaluation or the services to be provided. The parents retained an independent evaluator who determined that the Student had a specific learning disability. The Board then conducted their own evaluation and in December of 2001 identified the Student as eligible for special education services for reason of a specific learning disability.

The parties continued to have disputes about the nature and intensity of the services to be provided and in September of 2002 the parents requested a due process hearing.

In September of 2003, the hearing officer issued a Final Decision and Order #02-295 holding, among other things, that the board failed to timely evaluate the Student, and ordering that the Board shall reimburse the parents for the costs of private tutoring, that the Student's educational program be revised to take into account reports and recommendations of the Student's private tutor, and that the Board shall pay for the services of the Student's private tutor to consult on the Student's educational program at public school. (App. 43-44)

The parents had prevailed in due process because they had obtained relief on the merits of their claim that materially altered their legal relationship with the board, thus an award of attorney[s'] fees is appropriate. *Farrar v. Hobby*, 506 U.S. 103 (1992).

REASONS FOR GRANTING THE WRIT

I. This case presents matters of important public interest regarding *pro se* parents' access to rights and protections under the IDEA.

In the IDEA, Congress expressly provided that non-lawyer parents of a disabled child may prosecute their child's due process hearing *pro se*. In 2006,

this Court addressed the disagreement among the Courts of Appeals as to whether a non-lawyer parent of a child with a disability may prosecute IDEA actions *pro se* in federal court. "This question recurs frequently because of the large percentage of parents with disabled children who are unable to obtain or afford a lawyer." *Winkelman v. Parma City School District*, 550 U.S. ___ (2007).

This court further noted that,

> "It is beyond dispute that the relationship between a parent and child is sufficient to support a legally cognizable interest in the education of one's child; and, what is more, Congress has found that 'the education of children with disabilities can be made more effective by . . . strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.'" 20 U.S.C. §1400(c)(5)

II. The Court of Appeals erred in dismissing the appeal.

A. The petitioners have an immediate appeal of the district court dismissal under 28 U.S.C. §1291 and the Collateral Order Doctrine.

The parents' argument is set forth completely in the Appellant Brief, Jurisdictional Statement (App. 74-82).

B. The Order on Appeal was attached to the Notice of Appeal – district court order dated 7/23/07 (S.App. 53).

The Court of Appeals docketing fee was paid when this Notice Of Appeal was filed in district court. The appeal was dismissed on endorsement of the Appellee's Motion to Dismiss. The Motion to Dismiss ignores the 7/23/07 Order on Appeal, and discusses only the Memorandum of Decision and Order dated August 20, 2007 (S.App. 30). The Order of August 20, 2007 had resolved the Plaintiffs' Motion for Reconsideration in district court. Plaintiffs filed an "Amended Notice of Appeal", with Doc. #65 attached, to signal to Court of Appeals that the plaintiffs'-appellants' post-judgment motion for reconsideration had been resolved, and, that the appeal should go forward – FRAP 4(B)(ii) and (iii).

The Memorandum of Decision and Order (Doc #65) (S.App. 30) appeared to satisfy the rule that orders become final when they are placed on a separate document and entered on the docket – Fed. R. Civ. P. 58(a)(1). However, Doc. #65 doesn't mention the plaintiffs' motion for summary judgment, nor that the dismissal of same was affected with the Order on Appeal (Doc #57) (S.App. 53). FRAP 4(a)(7)(B) states, "a failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order."

"It should be remembered that the [separate document] rule is designed to simplify and make

certain the matter of appealability. It is not designed as a trap for the inexperienced . . . The rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss." – *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978)

The appellee's Motion to Dismiss states that no dispositive motions have been filed, (App. 95) confirming that a "new" district court case had begun – a case concerning matters other than plaintiffs' claim for reimbursement of attorneys fees and costs (that had been preserved for appeal). The Court of Appeals order of dismissal on October 10, 2008, adopts the appellee's position stating, "This Court has determined that it lacks jurisdiction over this appeal because a final order has not been issued by the district court as contemplated by 28 U.S.C. §1291. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978)." (App. 1)

The district court announcement on 7/23/07 (Doc #57) that "all dispositive motions shall be filed on or before September 7, 2007", constituted the final decision that all claims in the complaint, and, all claims included in the April 2004 motion for summary judgment were lost. They were dismissed by the district court without the award of the relief sought. Given their failure to realize an award of fees and costs through the April 2004 motion for summary judgment, the plaintiffs would be precluded (or estopped) under Fed. R. Civ. P. 41(b) from asserting the same claims against the same party(s). Had plaintiffs

failed to appeal the 7/23/07 order (Doc. #57) (S.App. 53) they would have lost their case.

The only federal matter left in district court was a claim, made for the first time by the defendant upon return to district court after the first appeal. Defendants claimed in their status report that the plaintiffs had litigated frivolously, and therefore, should pay the school district's attorneys fees and costs. By timely filing a Notice Of Appeal with the 7/23/07 order attached, the appellants preserved the disposition of their then-pending motion for summary judgment for appeal. Though appellees claim in their motion to dismiss that there was no final judgment and therefore, no appellate jurisdiction over the appeal, the record indicates that the motion for summary judgment had been resolved with finality.

The Supreme Court held that,

> "On the record in this case, the Court of Appeals erred in narrowly reading the second notice of appeal as applying only to the denial of petitioner's motions, since petitioner's intention to seek review of both the dismissal of the complaint and the denial of her motions was manifest from the record as a whole." *Foman v. Davis*, 371 U.S. 178 (1962)

In the present matter the parents have filed motions and documents that clearly indicate the order on appeal. The court erred in not considering the "record as a whole" in dismissing the appeal.

C. The District Court erred in determining that the parents were not deserving of reimbursement of IDEA prevailing party fees and costs. (App. 103)

The parents had prevailed in due process because they had obtained relief on the merits of their claim that materially altered their legal relationship with the board, thus an award of attorney[s'] fees is appropriate. *Farrar v. Hobby*, 506 U.S. 103 (1992).

The due process outcome (App. 43-44), where the parents were reimbursed by the board for the Student's private tutoring, and where the board was ordered to pay the parents' tutor as a consultant on the student's educational program, materially altered the legal relationship between the parents and the board, in a way that directly benefitted the parents. The due process outcome alone established the parents' prevailing party status versus the board of education under IDEA.

III. The Court abused its discretion in dismissing the appeal.

"Federal Rule of Civil Procedure 15(a) declares that leave to amend 'shall be freely given when justice so requires,' and denial of the motion without any apparent justifying reason was an abuse of discretion." *Foman v. Davis*, 371 U.S. 178 (1962)

In the present matter, the parents' April 2004 motion for summary judgment was disposed without

reason and with prejudice in the district court order of July 23, 2008 – the order on appeal. (S.App. 53)

IV. The respondent board of education has conducted this litigation in a manner that has injured the petitioners and congested the court system. This Court may signal to other litigants that such strategies will not be rewarded.

If educational agencies wish to avoid reimbursing parents' attorneys' fees and costs, they may choose to keep the parents in court for years. After all, the agencies aren't at risk of paying attorneys fees for the other side, and chances are better that the *pro se* parents will make a fatal error rather than survive the litigation versus a counseled opponent. In this matter, the petitioners have been pushed all the way up to the highest Court. This is hardly the "protection" that Congress had intended to provide children and their parents under the IDEA fee shifting provision. 20 U.S.C. §1415(i)(3)(B)(i)(I) The petitioners hope that the Supreme Court of the United States uses this case to signal staunch support for disabled children and their parents. And also, to show disdain for parties who thwart efficient vindication of IDEA rights and protections in the federal judiciary.

CONCLUSION

For the reasons set forth in the record and in this petition the petitioners respectfully submit that the writ for certiorari should be granted.

Respectfully submitted,

LISA H. ANDERSON, *pro se*
GORDON N. ANDERSON, *pro se*
19 Kearns Drive
Granby, CT 06035
860-653-5133

D.Conn. 03-cv-01695
Squatrito, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of October, two thousand eight,

Present:

Hon. Jon O. Newman,
Hon. José A. Cabranes,
Hon. Barrington D. Parker,
Circuit Judges.

L.A., on her own behalf
& as parent of M.A.,
G.A., on his own behalf
& as parent of M.A.,

Plaintiffs-Appellants,

v.

Granby Board of Education,

Defendant-Appellee.

07-4329-cv

(Filed Oct. 10, 2008)

Appellants, *pro se*, move to vacate this Court's July 28, 2008, order granting the Appellee's motion for extension of time to file its appellate brief. Appellee, through counsel, moves to dismiss the appeal. This Court has determined that it lacks jurisdiction over this appeal because a final order has not been issued

by the district court as contemplated by 28 U.S.C. § 1291. *See Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467 (1978). Upon due consideration, it is hereby ORDERED that Appellee's motion is GRANTED and the appeal is DISMISSED. It is further ORDERED that Appellants' motion to vacate this Court's July 28, 2008, order is DENIED as moot.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

By: /s/ Richard Alcantara
Richard Alcantara,
Deputy Clerk

App. 3

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Caption [use short title]

A. v. GRANBY BOARD OF ED.
[Motion Filed Jul. 22, 2008]

Docket Number(s): 07-4329-CV

Motion for: Defendant-Appellee's Motion to Extend Filing Date of Brief

Set forth below precise, complete statement of relief sought:

Defendant-Appellee seeks to extend the filing date of the Brief of Defendant-Appellee until one month after the court has ruled on the Defendant-Appellee's Motion to Dismiss, which is filed herewith

MOVING PARTY: Defendant-Appellee

☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Plaintiff-Appellant

MOVING ATTORNEY: Michael P. McKeon

[name of attorney, with firm, address, phone number and e-mail]

Sullivan, Schoen, Campane & Connon, LLC
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OPPOSING ATTORNEY [Name]: Lisa H. Anderson, Pro Se

[name of attorney, with firm, address, phone number and e-mail]

xxx xxx xxx
xxx xxx xxx

Court-Judge/Agency appealed from:

Please check appropriate boxes:

Has consent of opposing counsel:
A. been sought? ☐ Yes ☑ No
B. been obtained? ☐ Yes ☑ No

Is oral argument requested: ☑ Yes ☐ No
(requests for oral argument will not necessarily be granted)

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Has argument date of appeal been set? ☐ Yes ☑ No
If yes, enter date

Requested return date and explanation of emergency:

Signature of Moving Attorney:
/s/ [Illegible] **Date:** July 18, 2008

Has service been effected? ☑ Yes ☐ No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED** ~~**DENIED.**~~

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: Jul. 28, 2008

By: /s/ C. J. Minuse
Sup. Staff Attorney

September 8, 2003 Final Decision and Order 02-295

STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Granby Board of Education

Appearing on behalf of the Student: Attorney Lawrence W. Berliner
Howard Klebanoff, P.C.
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Appearing on behalf of the Board: Attorney Michael P. McKeon
Sullivan, Schoen, Campane & Connon, LLC
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Hartford, CT 06105

Appearing before: Attorney Christine B. Spak
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Has the Granby Board of Education [hereinafter, the Board] provided appropriate evaluations of the Student?

2. Has the Board developed and implemented an appropriate program for the 2001-2002 and 2002-2003 school years?

3. Did the Board offer appropriate summer services at the end of the 2002 school year?

4. If not, is the Board responsible for reimbursement of evaluations submitted by the parent, reimbursement of the consultant brought to the PPT by the parent, tutoring costs for the summer of 2002, tuition and transportation costs for the private reading and spelling program for 2002-2003 and/or the consultants' fees for 2002-2003?

SUMMARY:

The Student was in first grade when in April 2001 his parents requested that he be evaluated for developmental delays and learning disabilities due to difficulties with reading, spelling and writing. The Board convened a PPT and the parties did not agree on the evaluation or the services to be provided. The parent retained an independent evaluator who determined that the Student had a specific learning disability. The Board then conducted their own evaluation and in December of 2001 identified the Student as eligible for special education services for reason of a specific learning disability. The parties continued to have disputes about the nature and intensity of the services to be provided and in September of 2002 the parents requested a due process hearing.

This Final Decision and Order sets forth the Hearing Officer's findings of fact and conclusions of law. To the extent that findings of fact actually represent conclusions of law, they should be so considered, and vice versa. For reference, see *SAS Institute Inc. v. S&H Computer Systems, Inc., 605 F. Supp. 816, (March 6, 1985)* and *Bonnie Ann F. v. Callallen Independent School District*, 835 F.Supp.340 (S.D.Tex. 1993).

FINDINGS OF FACT:

1. The Student was born on xxx and was nine years old at the commencement of this hearing. B-2. He has been enrolled in the Granby public schools since beginning kindergarten and will enter the fourth grade in the 2003-2004 school year. P-60. He has no siblings and he was seven years old when he entered first grade. Testimony of Mother.

2. The parties agree that the Student is a well-behaved child. The Student was finding first grade hard and the Mother brought this up at the November parent-teacher conference and was told not to worry, that all children learn to read. The Mother testified that only later did she learn the the Student's first grade teacher, Nancy Shyer, had in fact placed him on a watch list for reading difficulties in the late fall. Testimony of Mother

3. Ms. Shyer testified that she first became concerned about the Student's reading in January 2001 and it was then that she shared these concerns with the Ms. Roy, the head of the Early Reading Intervention program [hereinafter ERI program]; at least by this point it is agreed that the Student was placed on a "watch list." The March Progress Report documented ultimate success with an independent writing task, but it also noted a hesitancy with reading and writing. At this point Ms. Shyer believed he could use some additional assistance with his reading, and she referred him to the ERI program. B-7, Testimony of N. Shyer.

4. The ERI program is a regular education intervention that is only available to first grade students. The head of the program in Ms. Roy and her assistant is Ms. Zeiner. Ms. Zeiner was not trained in Lindamood-Bell. Testimony of N. Shyer; Testimony of T. DiCorleto.

5. The parents contend that the ERI program was suppose to be a five day a week program and that the reason that their son never received five days and wasn't begun in it earlier was because there was no room and they had to wait until another student was exited before their son could attend. They further contend that when the Student began in the ERI program on March 23, 2001 there was only space three days a week rather than five. Neither Ms. Roy, the head of the ERI program, or Tracy E. Zeiner, the Student's instructor in the ERI program, testified. Once begun in the ERI program the Student was suppose to get three one-half hour sessions a week. The June 2001 End of the Year Reading Evaluation authored by Tracy E. Zeiner indicates that he received this level of service. B-17 The Mother disputed the claim that the Student received the three weekly sessions and the school/home ERI journal which was completed by both Ms. Zeiner and the Mother demonstrates that he did not get the number of sessions reported by Ms. Zeiner. In particular, in the first month he received significantly fewer than the three sessions a week that he was suppose to get and the frequency of the sessions increased only after the April PPT requested by the parents. There is no reliable evidence that the ERI program was provided with the frequency or consistency that it was

originally intended. Testimony of the Mother, B-17, P-30, P-3.

6. The first grade teacher referred the Student to summer school for help with reading. She is allowed to recommend three students each year out of the approximately twenty-one in her class. Testimony of Shyer.

7. On April 9, 2001 the parents requested a PPT to evaluate their son for developmental delays and learning disabilities. B-8.

8. The Board convened a Child Study Team regarding the Student in April 2001. It is the practice of this Board that even if it is the parent who brings a concern to a teacher which results in a Child Study Team reviewing the concern, the parent is only informed of the Child Study Team at the teacher's discretion. In this case the parents were "probably not" informed. Testimony of Sullivan, testimony of Mother as a whole.

9. The initial Planning and Placement Team ["PPT"] meeting was held on April 24, 2001. B-10.

10. Prior to the April 24, 2001 meeting, Thomas Bianca, a Board special education teacher, reviewed the Student's work samples and observed him in class when he was there for other duties. He did not conduct his normal informal assessment which would have consisted of activities like addition and subtraction and following directions because he was under the belief that the parents would not allow the Student to be pulled from the classroom for assessment purposes. Mr. Bianca could not remember why he believed that,

but thought it might have come from the classroom teacher, Ms. Shyer. Mr. Bianca also thought the parents wanted a formal evaluation to the exclusion of any level of informal assessment but he could not answer why he thought that or who told him that. He denied that it was the classroom teacher. At one point he further claimed that the parents' letter dated May 2, 2001, B-13, prevented the Board from completing any evaluations of the Student at the PPT. However, it is noted by the Hearing Officer that the parents' letter was written approximately one week after the April 24, 2001 PPT meeting. Testimony of Thomas Bianca

11. The conclusion that the parents were preventing assessments prior to the PPT does not bear out under the weight of the evidence. The parents are the ones who requested the PPT, who requested evaluation for a learning disability or a developmental delay and it was the parents who were repeatedly expressing concern about their son, at least since the November parent/teacher conference. Testimony of Mr. Bianca, testimony of Mother, B-10.

12. Based upon his review and observation, Mr. Bianca did not believe that the Student was exhibiting the signs that children with significant learning disabilities generally display, but felt that the Student was performing as could be expected of most first graders. Although he had never formally assessed or even formally observed the Student, his reasons for this were based on the work samples, classroom performance noticed in the course of other duties, an

absence of a family history of learning/reading disabilites, and from talking to Ms. Shyer, the classroom teacher. Testimony of Mr. Bianca.

13. Ms. Shyer testified that during a March parent teacher conference the Mother did express concern about pulling the Student from the classroom for ERI but then agreed before the end of that very conference to allow it. Ms. Shyer believed that in the March-April 2001 period the Student was not as strong a reader as she would have liked but he was still within the spectrum of first grade development, and that in respect to his peers, reading levels for first graders were constantly changing. She had conducted no formal assessments of the Student's reading ability. Testimony of Ms. Shyer

14. At the April 24, 2001 PPT meeting, Ms. Shyer and Mr. Bianca shared with the Team some of the Student's recent work samples and reviewed his classroom functioning. The Team noted that although his progress in the areas of reading and written language had been slower to develop, they concluded that his overall academic skills were still developing appropriately. Given that reading and writing are the core of what is taught in first grade this assessment by the Team is not very meaningful and is not credible. B-10.

15. The Board determined that there was insufficient evidence establishing the need for a full evaluation of the Student and the Parents' request for an evaluation was denied. B-10.

16. The Board asserts that it had qualified its April 24th decision not to evaluate by inserting into

the PPT record the phrase "at this time," to signify that it would reconsider the parents' evaluation request during the 2001-02 school year. The Board testified that the minutes of that PPT meeting were accurate. Nevertheless the PPT minutes do not reflect the Board's contention in regard to a Fall, 2001 evaluation. It is noted that the Board had inserted "N/A" indicating not applicable, in the section projecting the next PPT date for the Student. B-10, Testimony of Dr. Sullivan.

17. The Board had recommended the continuation of the ERI program at the April 24, 2001 PPT. In addition, the Board had recommended that the Student attend a summer reading intervention program during the summer following first grade. The PPT's rationale for those recommendations was to see what the ERI program would do and also see what summer school would do, and then the Team would "be in a position in the [F]all to see whether in fact formalized, individualized assessments [were] necessary." The Team believed that a month was an insufficient period of time in which to assess whether an intervention such as the ERI program had been successful. In fact, Thomas F. DiCorleto, the Board's Director of Special Services, testified that "it would be extremely unusual that a child would show any appreciable gain in a month." Testimony of Mr. DiCorleto, testimony of Dr. Sullivan.

18. The Parents had requested 1:1 reading instruction throughout the entire summer. The Board testified that it only had group reading instruction

available three days per week for a period of four weeks. Testimony of Ms. Camp.

19. Ms. Camp, the Principal of the Student's school, presented strong and credible testimony that small group instruction can be more helpful to a struggling reader than 1:1. She testified that small group instruction, as opposed to 1:1, enables a Student to learn from the advice of other students; learn while following along as other students read; learn from other students' mistakes; have some down time to think, reflect and escape; and often get a boost to their self-esteem by being with other students who are at their level. Testimony of Ms. Camp

20. The Parents informed the Board that they would secure the services of a private tutor, a certified teacher, to assist the Student each day with reading throughout the summer. Testimony of Mother.

21. On May 10, 2001 Ms. Shyer wrote the Mother a note indicating that the Student was an "early 2 level" reader. B-28

22. On May 17, 2001 Ms. Shyer wrote the Mother a note indicating that first graders fall into one of seven reading levels as follows: Emergent, Early 1, Early 2, Early 3, Early 4, Fluent White and Fluent Blue. The Student was between and Early 2 and Early 3 level at that point. B-29.

23. On June 22, 2001 the parent was informed that the Student was one of sixty one (61) first grade students out of 172 students who could not read an end of first grade or beginning level second grade book entitled *Frog and Toad. P-33*

24. And yet, in the Student's June 2001 Progress Report Ms. Shyer indicated that the Student was " . . . leaving first grade as a strong early reader. Although he is still primarily a phonetic reader." In addition, the teacher reported that the Student was able to read " . . . mid to late first grade books with 98% accuracy." B-18.

25. Although Ms. Zeiner did not testify, her June 8, 2001 assessment was entered into evidence. Four assessment materials were used with the following results: 75% accuracy on First Grade Level site word recognition with low automaticity; 96% accuracy and 100% comprehension on the Developmental Reading Assessment; and average score on the Clay Observation Survey Battery, Hearing and Recording Sounds and 90-100% accuracy on the four parts of the Kearns Informal Decoding Assessment. B-17.

26. In early Summer 2001, the parents retained Miriam Cherkes-Julkowski to evaluate the Student. Dr. Cherkes-Julkowski determined that the Student had a learning disability. Dr. Cherkes-Julkowski did not observe the Student in class or contact his teachers as part of her evaluation. Also, she tested him to the point of fatigue and it was not convincing that breaks would completely ameliorate the impact of such fatigue on a young child undergoing extensive testing. Dr. Cherkes-Julkowski acknowledged that the WISC is almost universally administered in intelligence testing; she elected, however, not to administer it. Rather, she administered the Raven, which uses norms from 1986, fifteen years prior to the Student's June 13, 2001 evaluation. Testimony of

M. Cherkes-Julkowski. The WISC-III employs more recent norms than the Raven. Testimony of Mr. DiCorleto. Additionally, the Raven does not test verbal intelligence; it is completely non-verbal. Testimony of Dr. Sullivan.

27. The parents provided a copy of Dr. Cherkes-Julkowski's evaluation report dated June 13, 2001, to the Board in a letter dated July 5, 2001. In that letter, the Parents had requested the Board to provide the Student with appropriate instruction commencing August 30, 2001 per the findings and recommendations set forth in that report and reimburse them for their evaluation costs. B-20.

28. In response to the parents' July 5, 2001 letter, Dr. Sullivan completed a special education referral form and indicated that the Board would require additional information regarding the Student's cognitive, academic, and speech/language skills in order to determine eligibility and programming. *B-22.*

29. On August 30, 2003 the Board scheduled a PPT meeting on September 6, 2001 in order to review the evaluation report from Dr. Cherkes-Julkowski and to determine the Student's eligibility for special education. *B-23.*

30. The parents objected to the extensive testing that the Board had proposed at the September 6th PPT meeting, based upon the belief that much of the testing was unnecessary and duplicative of the June, 2001 evaluation completed by Dr. Cherkes-Julkowski, and wanting time to review

the proposed testing with their evaluator. B-25, B-27; Testimony of Mother.

31. The parents objected to the proposed program of regular education instruction and supports recommended by the Board at the September 6th PPT meeting as inadequate for the Student's previously identified needs. *B-25.*

32. The parents requested that the Board reimburse all of their educational and evaluation expenses incurred to date, as outlined in their August 31, 2001 letter to the Board. *B-24,* B-25.

33. In a letter dated September 17, 2001, the parents requested the Board to reconsider the extent of testing that it had requested and limit the evaluation to the five areas outlined in their letter. B-29. The Board responded with another proposal in its letter to the parents dated September 18, 2001, pointing out that the eleven days that had elapsed since the PPT would make it unlikely to complete the evaluation prior to the October 5, 2001 PPT. B-30.

34. The Board convened a PPT meeting on October 19, 2001 to discuss the evaluation request and it had agreed to a reduction of the testing originally requested. B-33. The parents provided consent to the Board to evaluate the Student as the outcome of that PPT meeting. B-*34.*

35. The Student's second-grade teacher was Susan Bush, whom the Student's mother considered "a very able teacher." In fact, on April 8, 2001, she specifically requested Mrs. Bush, writing Mrs. Camp, the Kearns School Principal: "Placing [the

Student] with 'the right' teachers will be centrally important. He needs to be in Mrs. Bush's class for Grade 2. Please confirm that this assignment will be made." Additionally, on August 16, 2001 the Student's mother sent a copy of Dr. Cherkes-Julkowski's June 13, 2001 evaluation report to Mrs. Bush, with a cover memorandum that said in part: "We have heard many great things about Mrs. Bush!" Testimony of Mother, B-8, P-34.

36. On various occasions during Fall 2001, Mrs. Bush attempted to persuade the Student's parents to agree to the interim services that the PPT had offered on September 6, 2001, telling them that Mrs. Cohen's reading program would help the Student become a better and more fluent reader. She reiterated this on the Student's November 2001 Progress Report, writing: Although [the Student] has not yet attained fluency in his oral reading, understanding of the phonetic code is a strength. [The Student] has limited sight vocabulary and therefore must sound out most words on a page of text. I feel it would be very beneficial for [the Student] to receive reading support from our reading specialist on a daily basis. This would help strengthen his skills, expanding his sight vocabulary, give him additional reading time in a smaller group setting and help him increase his confidence, Testimony of Ms. Bush, B-59

37. The Student's Mother, however, told Mrs. Bush that the Board "really didn't know how to teach reading," and in November 2001 the parents still

refused to permit anyone outside of his classroom teacher work with him. Testimony of Ms. Bush.

38. The Board proceeded to complete its T.E.A.M. evaluation of the Student during October and November, 2001. B-35 to B-38.

39. The Board provided the parent with a copy of its evaluation report, entitled "T.E.A.M. Review," shortly after the December 3, 2001 receipt date stamped on the cover page. B-42; Testimony of Parent.

40. Board personnel including a school psychologist, classroom teachers, special education teachers, and related service providers provided information that comprised the T.E.A.M. report. Information from the parents was also included in the report. It had been obtained through a telephone interview. B-42.

41. The T.E.A.M. report established that the Student had a specific learning disability and that he was eligible for special education and related services. B-42.

42. Based upon its findings, the T.E.A.M. report made a series of recommendations for the Student. B-42.

43. The December 7th PPT determined that the Student was eligible for special education and related services as a Student with a specific learning disability. The PPT then proceeded to develop an IEP for the Student for the balance of the 2001-02 school year, which the parents accepted on December 7, 2001. B-43, B-44.

44. Dr. Cherkes-Julkowski attended the PPT with the parents although she had to leave before the end. Both the independent evaluation and the Board evaluation found that the Student had a learning disability but there were some points of disagreement. The Board disagreed with Dr. Cherkes-Julkowski's assertion that the Student's deficit was primarily in the area of phonological processing, an auditory skill. Rather, the Board's TEAM evaluation determined that the Student's primary deficit was in visual memory, specifically being able to rapidly retrieve sight words, which impacted his fluency. The Board evaluation found some phonological weakness but did not feel it was not as significant a disability of his as was identified by Dr. Cherkes-Julkowski.

45. From approximately December 12, 2001 through the end of the 2001-2002 school year, Judith Cohen provided 2.5 hours per week of reading instruction to the Student, two hours of which was in a group setting and thirty minutes of which was one-on-one. Dr. Cherkes-Julkowski testified that she believed Ms. Cohen 'had a good handle on the ideas' with respect to the Student's reading instruction. Testimony of Ms. Cohen, Testimony of Dr. Cherkes-Julkowski.

46. The parents sent the Board a letter dated January 3, 2002 requesting modifications in five overall areas of the Student's IEP. By this time they had already retained counsel. They did not object to the clear statement in the December PPT minutes which indicated that they had accepted the IEP. Also, they did not request another PPT,

although they were informed that they could do so. B-47, B-48.

47. The Board responded at length to the parents' January 3, 2002 letter in an undated letter that was date-stamped January 15, 2002 but they did not convene a PPT because the Mother had not requested one. *B-48.* The Board testified that it was not surprised to receive the parents' letter. Testimony of Dr. Sullivan

48. On April 23, 2002 three Board members sent the parents a letter indicating that since January, 2002 there had been " . . . a significant trend of inconsistencies and selectivity in the completion of homework assignments by [the Student]." This letter was signed by Thomas Bianca, the Learning Disabilities Teacher/Program Coordinator, Susan Bush, the Second Grade Classroom Teacher and Judith Cohen, the Reading Consultant. *B-50.*

49. The parents responded on April 26, 2002 asking the following questions:

    1) Why did it take 4 months for Mrs. Bush, Mrs. Cohen and/or Mr. Bianca to notify us about problems related to homework?

    2) Why did Mrs. Bush fail to cite the alleged problems in her March Progress Report?

    3) Why did Mr. Bianca fail to cite the alleged problems in his March Progress report?

    4) Why did Mrs. Cohen indicate in her March Progress Report that [the Student] returns homework promptly and consistently? Should

we believe Mrs. Cohen's official report from March or her contradictory claim expressed in the April 23 epistle?

5) Why did Mrs. Bush, Mrs. Cohen and Mr. Bianca fail to mention alleged homework problems during their joint, face-to-face conference with us in March?

6) Finally, if homework assignments were NOT completed, could [the Student] have advanced as significantly as Mrs. Bush, Mrs. Cohen and Mr. Bianca report in [the Student's] official school records? (emphasis in original) B-51

50. The record strongly establishes that the parents had recently received information from the Board exactly the opposite from the information set forth in the Board's April 23rd letter. In particular, Mrs. Bush, the classroom teacher recorded throughout the entire school year that the Student had completed his homework with a letter "M," signifying that it was completed "much of the time," the second highest grade on the report card. B-59. Mrs. Cohen, the Board's reading teacher reported in her March 21, 2002 Progress Report that the Student had "consistently" returned his books and homework promptly, P-16. Mr. Bianca, the Board's special education teacher had credited the Student's recent growth especially to his classroom teacher *and* to his family in his March, 2002 Progress Report. P-15. Further, the testimony of each of these three individuals, Mrs. Bush, Mrs. Cohen and Mr. Bianca, on the issue of homework and the writing of this

letter was variously evasive, hesitant and not believable; and on this point none of them were credible. Testimony of Thomas Bianca, testimony of Susan Bush and testimony of Judith Cohen.

51. On April 12, 2002, Dr. Cherkes-Julkowski evaluated the Student again. In this evaluation Dr. Cherkes-Julkowski stated that the Student "became sweaty and pale during a math assignment and he was brought to the nurse. He vomited and was sent home." B-49(1-2). This incident was reported to Dr. Cherkes-Julkowski by the Student's mother. Testimony of Dr. Cherkes-Julkowski. Mrs. Bush testified, however, that the Student went to the nurse around lunchtime and subsequently went home with a fever. The Student then remained out of school the following day with a fever. In general, the Student did not appear to have somatic illnesses, as most of his illnesses involved a fever and were in proximity to other children's absences for the same reasons. Testimony of Ms. Bush. Further, Dr. Cherkes-Julkowski reported that the Student's "math computation performance has declined relative to his peers and not enhanced but diminished his standing." Dr. Cherkes-Julkowski contrasted the Student's performance with his peers despite admitting that she had never observed the Student in his classroom. In fact, although Dr. Cherkes-Julkowski originally testified that the Student could not keep pace with his classmates, she admitted that she had never observed the Student's class. Testimony of Dr. Cherkes-Julkowski, Testimony of Ms. Bush.

52. Once again Dr. Cherkes-Julkowski did not observe the Student in class or contact his teachers as part of her evaluation leading to misunderstanding on her part thereby likely resulting in a lower than deserved score for the Student. When evaluating the Student, Dr. Cherkes-Julkowski presumed he was being taught with a methodology that the Granby Public Schools was no longer using. Testimony of Ms. Bush. For example, Dr. Cherkes-Julkowski used a horizontal format when doing computations, whereas Mrs. Bush employs a vertical format. Additionally, Mrs. Bush testified: '[Dr. Cherkes-Julkowski's] expectation that [the Student] should have been able to add carrying the ones, the tens, and the tens to the hundreds was not a valid expectation. Here in Granby, we teach that now in third grade.' Id.. Ms. Cohen testified that some of parts of the decoding portion of the evaluation (diphthongs and r-controlled vowels) are not covered until mid to late second grade in Granby; therefore the Student should not have been expected to have known them in April. These types of errors and omissions as well as opposing testimony by other of the parents' own witnesses undermine the reliability of this witnesses' evaluations. See testimony of Dr. White-Roath on the use of a electronic reader, testimony of Ms. Cohen, testimony of Dr. Cherkes-Julkowski.

53. Mrs. Bush was surprised by Dr. Cherkes-Julkowski's April 12, 2002 evaluation, because what Dr. Cherkes-Julkowski was reporting was different from what Mrs. Bush was observing. For example, Mrs. Bush saw the Student as a child who had a far better grasp of phonetic

knowledge than Dr. Cherkes-Julkowski reported. In fact, Mrs. Bush believed that the Student "overly relied" upon phonetic patterns rather than under utilized them as Dr. Cherkes-Julkowski reported. Testimony of Ms. Bush.

54. In April 2002, the same month that Dr. Cherkes-Julkowski re-evaluated the Student, the Cognitive Abilities Test was administered to all 176 second-graders in the Granby Public Schools. The system averages for the 176 students were: Verbal – 110; Quantitative – 110.7; and Non-Verbal – 112, for a Composite of 112.6. B-67. The Student's scores were: Verbal – 121; Quantitative – 111; and Non-Verbal – 107, for a Composite of 114. B-60. These scores placed the Student almost exactly average for the Granby second-grade population. The Student was required to read in the verbal and in some of the quantitative sections of the Cognitive Abilities Test, but no modifications or provisions were made for him when he took the test. Testimony of Mr. DiCorleto, B-60, B-67.

55. From May 8 through 23, 2002, Ms. Cohen evaluated the Student as part of his End of Year Reading Assessment for IEP Program Review. Based upon her evaluation, Ms. Cohen found that the Student had made satisfactory progress on his reading goal, which was: "[The Student] will improve his reading skills to an end of grade 2 level." Testimony of Ms. Cohen, B-55.

56. In May and June 2002, Mr. Bianca assessed the Student's progress on his spelling and written language skills goal, which was: "[The Student] will improve spelling and written language skills

to grade 2 standards." Mr. Bianca determined that the Student had made satisfactory progress on this goal, having mastered three of the five objectives and made satisfactory progress on the other two. As part of his assessment, Mr. Bianca also administered the KeyMath-R. At the time of that assessment, the Student was approximately 8 years, ten months old. B-1. The Student's scores on the KeyMath-R demonstrated that his scores had an age equivalency of 11-11 on Basic Concepts, 8-7 on Operations and 10-1 on Applications, for a overall age equivalency of 9-10. These results contrasted sharply to Dr. Cherkes-Julkowski's April 12, 2002 statement that the Student's "math computation performance has declined relative to his peers and not enhanced but diminished his standing." B-49. They comported, however, with the Student's scores on the April 2002 COGAT, on which his quantitative score of 111 was slightly higher than the Granby average of 110.7, B-55, B-60 & 67; Testimony of Mr. Bianca and Mr. DiCorleto.

57. On June 3, 2002, the Board convened the Student's annual review PPT meeting. B-56. At the June 3, 2002 PPT meeting, the Board offered to reimburse the parents for the cost of the tutoring they had procured for the Student during Summer 2001, which had been provided by a Board kindergarten teacher, but at that point the parents rejected the Board's offer. The Board also offered to pay for eighteen hours of summer tutoring by Dr. Mary White-Roath, the tutor chosen by the parents for the upcoming summer (2002). The parents wanted more hours and rejected the Board's offer, and instead retained

Dr. White-Roath on their own. Testimony of Mr. DiCorleto, testimony of Mother.

58. The Board had proposed IEP goals and objectives for the 2002-03 school year. At the June 3, 2002 PPT meeting, the Board members of the PPT recommended a total of 3.0 hours per week of special education services in written language, spelling and math, and 2.5 hours per week of related services, specifically reading instruction from the reading consultant. The parents did not accept the proposed IEP and requested an opportunity to review the draft IEP goals and objectives with Dr. Cherkes-Julkowski, who was unable to remain for the entire PPT meeting. B-56.

59. From June 24, 2002 through August 27, 2002, Dr. Mary White-Roath provided one-on-one tutoring to the Student. P-14, P-58, Testimony of Dr. White-Roath.

60. Dr. Mary White-Roath presented her Curriculum Vitae that demonstrated an extensive amount of training and experience, both professional and practical, in the areas of special education and reading instruction. She not only served as adjunct faculty on several colleges and universities but she had extensive experience teaching children to read. She has not been formally trained in Lindamood Bell but she does use their manual. She had been trained in Orton-Gillingham in 1978 and Lindamood-Bell is an offshoot of that program. She has had training in the Wilson reading program. She uses an eclectic approach and varies tasks until a skill is mastered. She

testified in a direct and credible manner. P-49, Testimony of Dr. White-Roath.

61. When Dr. White-Roath began working with the Student in the summer of 2002 he had completed second grade. The Student's vowel sound skills should have been present and he definitely did not have it. He did not know his alphabet sounds in isolation. For instance, he would say "ka" for "k". Out of fifty-six possible vowel sounds, the Student only knew approximately five. The witness testified that at the end of the second grade, the Student was at the end of first grade in terms of his fluency, but he was not a nonreader as implied by Dr. Cherkes-Julkowski testimony that the Student couldn't read on his own. On this last point the Student's Mother had also testified that during Summer 2001 the Student read numerous books as part of the State of Connecticut summer reading program. P-14, Testimony of Mother, Testimony of Dr. Cherkes-Julkowski, Testimony of M. White-Roath.

62. For this Student, reading sessions of one-half hour more frequently are more valuable than longer sessions less frequently. Continuity and consistency are essential, even if it means missing other school activities such as assemblies. The Student needs well trained instruction which means the teacher must provide direct, systematic, explicit instruction using a variety of tasks to keep the Student engaged until the skill is mastered. A whole language and phonetic approach is needed. The Student is not ready for guided reading. An electronic reader, recommended by Dr. Cherkes-Julkowski, is a total

waste of time and would likely interfere with teaching him to read. Dr. White-Roath believes 1:1 instruction is essential for the Student. She uses both Lindamood Bell materials and Wilson materials with the Student; both are needed because Lindamood Bell is a slower paced program, but Wilson, which may be too fast at times, also helps retain his interest. Testimony of Dr. White-Roath.

63. The parents wrote the Board on June 13, 2003 and requested several changes in the draft IEP that had been proposed to address reading, math, writing, fluency, articulation, problem solving, and certain modifications to the regular classroom environment. B-58.

64. The Board scheduled a PPT meeting on September 6, 2002, *B-65,* in order to review the IEP changes requested in the parents' June 13, 2002 letter. *B-68.*

65. The Board proposed another draft IEP for consideration. The parents did not accept the draft IEP presented at the PPT meeting. The Board stated that it would not reimburse the parents for the 1:1 tutoring costs associated with Dr. Mary White-Roath; the Board was aware that the parent intended to take the Student to frequent tutoring sessions with her; the parents were aware that the Board's positon was that they had competent staff (third grade reading consultant Judy Latonie) to provide the needed services. The parents did agree to allow Dr. White-Roath and Ms. Latonie consult regarding the Student reading and spelling goals and program. IEP. B-68.

66. Dr. White-Roath did not know the credentials of Judy Latonie, the Board's third grade reading consultant, but they did speak for approximately ten minutes by phone and Dr. White-Roath felt Ms. Latonie was knowledgeable. Ms. Latonie indicated that she was going to recreate what Dr. White-Roath had been doing with the Student. She even spoke of providing 1:1 three days a week. Testimony of Dr. White-Roath

67. Judith Latonie, a reading consultant at Kelly Lane School, has a Bachelor's in Psychology, a Master's in Child Development, and a Sixth Year Degree in Reading and holds teaching certificates in pre-k through three, as well as in four through eight for general education, a Remedial Reading Certificate for kindergarten through twelfth grade, as well as an administrator certificate in the area of reading consultant. Testimony of Judith Latonie.

68. Ms. Latonie provides group and one-to-one reading instruction to both regular educatoin and special education studetns with reading difficulties. One of the means Ms. Latonie uses to monitor the reading skills of children in the building is by keeping track of the CMT scores. Id.

69. The Board sent the Parents a copy of the September 9, 2002 IEP per a letter dated September 11, 2002. B-72. By a letter dated September 16, 2002, the Parents advised the Board that they were rejecting the 2002-03 IEP that had been proposed at the September 9, 2002 PPT and indicated that they would be contacting the Board soon to schedule another PPT. B-73.

70. In September 2002, Ms. Latonie spoke with Dr. White-Roath regarding what the latter was doing with the Student and also discussed transferring that tutoring to Kelly Lane school, which Dr. White-Roath believed would be appropriate. In fact, both Ms. Latonie and Dr. White-Roath felt that the turoing could be successfully transferred to Kelly Lane. Ms. Latonie communicated this to the parents by way of a memo dated September 17, 2002. Id., B-90.

71. Ms. Latonie had consulted with the thrid grade teacher to work out a program for the Student's special education instruction. The schedule they worked out demonstrated careful thought and consideration of the parents' concerns. The Student's proposed program could start on three days a week at 8:00 a.m., before the school day, so the Student wouldn't miss much of the regular classroom experience. This had been a concern of the paretns in the past. The schedule also invovled varying the times on different days so that the Student would not be missing the same thing in the regular class every day. The September 17, 2002 memo invited the parents' input and indicated that the teachers were flexible and would be receptive to the parents' preferences. Testimony of Ms. Latonie, testimony of Mother, B-90.

72. On September 30, 2003, Ms. Latonei wrote the parents again regarding scheduling, this time addressing the Student's desire to participate in chorus. Again, the letter was professional and demonstrated concern for the parents' input. B-91.

73. The parents requested a Due Process hearing through a letter dated September 30, 2003. The parents presented the following requests/issues:

    1. Reimbursement of daily 1:1 reading and spelling instruction with Dr. White-Roath, including tuition and transportation.

    2. Reimbursement ofr summer turoing costs of Dr. White-Roath.

    3. Reimbursement of costs for an annual educational assessment of progress and program by Dr. Cherkes-Julkowski.

    4. Alignment of the school based instruction with the instruction provided by Dr. White-Roath.

    5. Consultation between school based staff and Dr. White-Roath at Board expense.

    6. Reimbursement of all educational expenses incurred by the parents, as requested in previous PPT meetings.

    7. Provision of an independent assistive technology evaluation.

    8. And per the parents' Prehearing Statement of the Issues dated October 22, 2003, the additional issue of whether the Board has denied the Student FAPE during the 2001-02 and 2002-03 school years.

74. The issue of reimbursement for Summer 2002 reading services was subsequently resolved by the parties and that was ultimately not an issue at this hearing. In addition, the issue of whether

the Board had to provide an independent assistive technology evaluation was subsequently withdrawn by the parties and that is not an issue at this hearing. Student's Brief.

75. In October 2002, the Student, then a third grader, took the off-level Connecticut Mastery Test ["CMT"]. On the CMT, the Student achieved mastery in fifteen of sixteen areas under Mathematics. Granby students generally score higher on the CMT than the state norm. Nonetheless, the Student's overall raw score of 83 in Mathematics was higher than the school average of 80 and the district average of 80.1. Testimony of Ms. Cohen, B-83, B-84.

76. The Student mastered one of three categories under Reading Comprehension. This was only slightly below the district average of 1.5 categories, the school average of 1.4 categories, and the class average of 1.6 categories. Id.

77. The Student did no master either category under Editing and Revising, but only 49% of the district, 50% of the school, and 57% of the class mastered Composing and Revising, and only 47% of the district, 49% of the school, and 62% of the class mastered editing. B-84.

78. The Student mastered the Writing Sample, having achieved goal on the Holistic Writing. B-84. Only 24% of his class attained that goal. Id.

79. On the October 2002 CMT, the Student also scored a 46 on the Degrees of Reading Power ["DRP"], the state goal for which was 39. B-83; B-84. The DRP "is usually the test that's looked at

to determine whether a child is in need of reading services." Testimony of Ms. Cohen, testimony of Ms. Latonie. The Student's 46 placed him only one point below the school and district averages of 47, and three points below his class average of 50. B-84. The Student was allotted ten more minutes than the seventy minutes allocated by the state on the DRP. P-38, Testimony of Mr. DiCorleto, Testimony of Ms. Cohen.

80. The parents did not accept the Board's offer to have Ms. Latonie work with the Student, and rather, kept the Student in private tutoring with Dr. White-Roath. As a result the Student was tardy 57 times due to the tutoring during the 2002-2003 school year. Dr. White-Roath had never had a child who came to her during the school day for tutoring. Testimony of Mother, testimony of M. White-Roath, P-58, P60.

CONCLUSIONS OF LAW:

1. There is no dispute that the Student is entitled to special education and related services as a Student identified with a specific learning disability and thereby entitled to receive a free and appropriate public education ("FAPE") pursuant to 20 U.S.C. § 1400 et. seq., the Individuals with Disabilities Education Act ("IDEA", also "the Act"), 34 C.F.R Section 300.7(a) and Section 10-76a-1(d) of the Regulations of Connecticut State Agencies (RCSA).

2. The Act defines FAPE as special education and related services which:

"(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under Sec. 614(d)." 20 U.S.C. Section 1401(8).

3. Connecticut Regulations provide that "the public agency has the burden of proving the appropriateness of the child's program or placement or of the program or placement proposed by the public agency." Conn. Reg. 10-76h-14

4. The standard for determining whether a Board has provided a free appropriate public education starts with a two prong test established in *Board of Education of the Hendrick Hudson Central School District et al. v. Rowley*, 458 U.S. 176 (1982), 102 S.Ct.3034. The first prong requires determining if the Board complied with the procedural requirements of the Act and the second prong requires determining if the individualized educational program developed pursuant to the Act was reasonably calculated to enable the child to receive educational benefit.

5. Addressing the *first* prong of the *Rowley* inquiry, the Board should have evaluated the Student's eligibility for special education and related services after the April 24, 2001 PPT meeting

pursuant to the IDEA's *Child Find* regulations. 34 C.F.R. §300.125(a)(iii). At the April 24, 2001 PPT meeting the Board had received sufficient input from the parents regarding their son's marginal educational performance, 34 C.F.R. §300.535(a)(1); as well as possessing information from its own educational files establishing that the Student had difficulties with reading, spelling, letter sounds, and writing.

6. The Board argues that The *State of Connecticut Department of Education Guidelines for Identifying Children with Learning Disabilities ["Guidelines"]* require that additional regular education strategies and programs be in place and tried before an evaluation is done. *Guidelines,* p. 17. If the Student has not participated in an intervention process, the argument continues, school districts are directed that no evaluation is recommended. This argument is faulty for two reasons. First, the guidelines are just that, guidelines not law. They have not been enacted into law and therefore have not undergone the process of discourse and scrutiny that statutes and regulations undergo. Consequently they do not have the force of law and, therefore, while at times helpful in a due process hearing, they are not controlling on a due process decision. Further, the Board's argument on this point would potentially undermine the IDEA's *Child Find* regulations, which do have the force of law. 34 C.F.R. §300.125(a)(iii). Pursuant to their argument even a board that abrogated its responsibility under *Child Find* to affirmatively identify, locate and evaluate children with disabilities, would be rewarded with a time period during

which the implementation of special education services, and their attendant costs, would be delayed while regular education interventions are initiated. Therefore, the correct question is not whether the *Guidelines* should be applied to this case, but rather, whether there was enough data available to the Board for the IDEA's *Child Find* regulations to have required the Board to initiate regular education interventions sooner, so that, as of April 2001 the requirements of both the *Guidelines* and *Child Find* would have been satisfied.

7. The issue for the April 24th PPT was not whether the Student would be eligible for special education and related services, but whether he should be referred for an evaluation in order to determine his eligibility. State regulations require that " . . . a diminished ability to listen, speak, read, write, spell, or do mathematical calculations . . . ," be established in order to determine the existence of a suspected learning disability. RCSA §10-76a-2(d). See also 34 C.F.R. §300.541(a)(1), (2). The record as of April 24, 2001 PPT indicated that the Board was aware that the Student had difficulties with certain portions of the language arts curriculum during kindergarten and first grade per the report cards and teacher concerns. Further, the Board had referred the Student to its Early Reading Intervention (ERI) services during March, 2001 and the Board had recommended that the Student attend a summer reading intervention program after the end of the first grade. Further, the Student was the oldest child in his class, and although Board staff dismiss the significance of this stating that it is only

the amount of instruction, not age that is relevant; the Student's age removes issues of age (being very young for a grade) as a factor affecting his reading ability. The Board argues that to abide by the *Guidelines* their regular education interventions needed more time before assessing whether they were working and considering evaluation. However, the Board had enough information supporting a need for increased regular education interventions at least since January 2001. The evidence supports the conclusion that there simply was not enough space in the ERI program so the Student had to wait. Once he started his teacher was not trained in Lindamood Bell, she did not provide the scheduled amount of sessions and then she inaccurately reported on the number of sessions in her end of the year report. To the extent that the Board did not have an ample enough opportunity to intervene with regular education strategies pursuant to the *Guidelines* it is there own delay in initiating those strategies that foreshortened their time period for assessment of the effectiveness of those strategies. The Board should have arranged for a comprehensive multi-disciplinary evaluation at the April 2001 PPT meeting.

8. The Board had up to forty-five (45) school days to evaluate the Student's eligibility for special education from the date of the April 24th PPT, RCSA §10-76d-13. If it had elected to complete the evaluation requested by the parents, it could have completed the evaluation either before the end of the 2000-01 school year or schedule a PPT meeting shortly after the commencement of the 2001-02 school year. The Hearing Officer does not

find it credible that the Board had stated that it was prepared to evaluate the Student during the Fall 2001. No further PPT or date for future evaluation was set at the April 2001 PPT. It was only after the Board had received Dr. Cherkes-Julkowski's evaluation that it scheduled a PPT on September 9, 2001 in order to discuss the results of that evaluation. Services began after the December 7, 2001 PPT identified the Student as eligible.

9. The fact that the Board had a forty-five time limit did not bar an entitlement to special education during that time period. *Unified School District v. Conn. Dept. of Education*, 64 Conn. App. 273, 298, 35 IDELR 30 (2001). Consequently, the Student was deprived of special education during the 2001-02 school year, by the actions of the Board, for approximately four months.

10. Violations of the IDEA's procedural requirements do not automatically mean that a denial of FAPE has occurred, however, when the procedural violations result in the loss of educational opportunity then a denial of FAPE has clearly resulted. *Scottsdale (AZ) Unified School District, supra, 38 IDELR 204.* In the present matter, the Board's failure to evaluate the Student's eligibility for special education in a timely manner from the April 24, 2001 PPT meeting, to December 7, 2001 PPT meeting, had resulted in the Student losing approximately four (4) months of educational opportunity during the 2001-02 school year.

11. The procedural guidelines of IDEA are designed to guarantee that the education of each child

with disabilities is tailored to meet the child's unique needs and abilities. 20 U.S.C. Secs. 1412 and 1415. These procedural guarantees are procedural safeguards against arbitrary or erroneous decision-making. Daniel R.R. v. State Board of Education, 874 F.2d 1036, 1041 (5th Cir. 1989).

12. The obligation to provide an *IEP* "generates no additional requirement that the services so provided be sufficient to maximize each child's potential," *Rowley*, 458 U.S. at 198, 102 S. Ct. at 3046-47, for "[a]ll the school system must provide is an IEP which is 'reasonably calculated' to provide an 'appropriate education,'" *Rome School Comm. v. Mrs. B.*, 247 F.3d 29, 33 (1st Cir.2001), because while the "IDEA requires states to provide a disabled child with meaningful access to an education, . . . it cannot guarantee totally successful results." *Walczak,* 142 F.3d at 133 (citing *Rowley,* 458 U.S. at 192, 102 S. Ct. at 3043-44). However, an IEP must provide an opportunity for more than trivial advancement in order to satisfy the IDEA's FAPE requirements. *Mrs. B. v. Milford Board of Education* 103 F.3d 1114, 1121 (2d Cir. 1997). In this case, the evidence establishes that the Student had made educational progress sufficient to satisfy the standard set in *Mrs. B.* during his years at the Kearns School and now at the Kelly Lane School. In October 2002, while in third grade at the Kelly Lane School, the Student far exceeded the goal on the DRP, obtaining a score of 46, which was only four points below the goal for students in *fourth* grade. His most recent report card that was introduced into evidence also reflects that the Student continues to make steady growth in reading and that his work in

language arts is between average to excellent. Similarly, in mathematics the Student has been generally excellent, although he continues to struggle with math facts. In short, the Board has satisfied its obligation to provide the Student with a free appropriate public education for the 2001-2002 and 2002-2003 school years.

13. Due Process Hearing Officers have the authority to provide compensatory education as an equitable remedy for a denial of FAPE. *Inquiry of Kohn* 17 EHLR 522 (OSEP) (2/13/91) (citing with approval *Lester H. v. Gilhool* 916 F. 2d 865 (3d Cir. 1990), *Burr v. Ambach* 863 F. 2d 1071 (2d Cir. 1988)). "Compensatory education effectuates this purpose by providing FAPE which the child was entitled to receive." *Id.* The Board had ample opportunity to evaluate the Student and determine his needs for special education prior to the December 7, 2001 PPT meeting. It elected not to do so and the Board should not be allowed to profit from its own inaction after it was placed on notice at the April 24, 2001 PPT that the Student had issues per the parents'concems and the Board's own records. Since this matter does not encompass a denial of FAPE for the 2000-01 school year, the Hearing Officer is not authorized to provide any relief for that school year. However, the Hearing Officer finds that compensatory education is appropriate for a four-month period beginning the 2001-2002 school year during which the Student should have, but did not have, a program in place for reason of the Board's failure to evaluate him in April 2001. *Mrs. C. v. Wheaton* 916 F.2d 69 (2d Cir. 1990), *Everett v.*

Santa Barbara High Sch. Dist., 36 IDELR 35 (9th Cir. 2002).

14. A parent has the right to an independent evaluation at public expense if they disagree with an evaluation obtained by the public agency and if they request such independent evaluation. 34 C.F.R. §300.502(b)(1)-(2). In this case, the Board rightly reimbursed the parents for Dr. Cherkes-Julkowski's June 13, 2001 evaluation. However, the evidence does not support the conclusion that the parents expressed disagreement with the TEAM evaluation or that they requested that the Board provide them with an independent evaluation prior to unilaterally obtaining Dr. Cherkes-Julkowski's April 12, 2001 and April 28, 2003 evaluations. Consequently, they are not entitled to reimbursement for those evaluations.

15. The parents request that the Board be ordered to retain Dr. Cherkes-Julkowski to assess the Student on at least a yearly basis. This is not appropriate for several reasons. First, for reasons stated in the Findings of Fact, Dr. Cherkes-Julkowski's evaluations in this matter were not very reliable. Therefore, she would not be a good choice for independent evaluator if one were needed. Second, the record reflects that the Board has competent and properly trained and competent staff (e.g. Ms. Latonie) who could cooperate with Dr. White-Roath to transition the Student back to the Board for his reading program and provide the necessary services to this Student. The only significant difference is over the issue of how much of the instruction needs to be one to one, and at what point does it change.

This is a fluid situation by definition, with the Student constantly changing as he matures and learns. Just as it is valid that the Student has made progress with the 1:1 instruction provided by Dr. White-Roath (who in fact provided most of his reading instruction), Ms. Camp made a number of good points about the benefits of small group instruction, at least for some of the learning to read experience. Often, in Board settings the treatment providers participate in the evaluation process (as with the TEAM evaluation). With properly trained service providers in place who are willing to respect and consider the parents' concerns, the need for an outside evaluator should not be necessary; nor is it likely to promote any improvement in the progress this child makes.

16. The IDEA provides that "the removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes . . . cannot be achieved satisfactorily." 34 C.F.R. §300.550(b)(2). In this case, Dr. White-Roath testified that the Board's reading consultant was "knowledgeable," and appeared ready to implement a program similar to that which Dr. White-Roath had been providing. On September 17, 2002, Ms. Latonie wrote to the Student's mother: "[Dr. White-Roath] and I both feel that we can successfully transfer [the Student's] ongoing work in the Wilson program to Kelly lane." In short, there is no evidentiary basis that would support the parents' claim that the Student requires reading instruction outside of school at the Board's expense for the 2002-2003 school year to

have F.A.P.E. The least restrictive environment for the Student's reading instruction for the 2002-2003 school year is Kelly Lane School.

FINAL DECISION AND ORDER

1. The Board failed to timely evaluate the Student when initially requested in April 2001. The Board did appropriately evaluate him in the Fall 2001 and subsequently.

2. The Board provided the Student with an appropriate IEP for the 2001-02 and 2002-03 school years.

3. The Board shall reimburse the parents for four months of educational expenses related to the private tutoring provided by Dr. White-Roath for the 2002-03 school year.

4. The Board shall not, as part of this order, reimburse the parents for their expenses for the evaluation reports from Dr. Cherkes-Julkowski for the 2001-02 and 2002-03 school years.

5. The Board shall convene a PPT meeting within fifteen days from the date of this decision to discuss necessary revisions to the Student's 2003-04 IEP, taking into account the input from the Student's parents and the recent reports and recommendations from Dr. White-Roath, P-58. The Board will schedule this at a time during which Dr. White-Roath can attend.

6. The Board shall pay for the services of Dr. White-Roath to consult as needed during the 2003-2004 school year up to a maximum of thirty hours

from September 2003 through June 2004. This will include time attending PPTs and consulting in person or by phone with Board staff. It will not include any private tutoring sessions of the Student, should the parent elect to continue these. With this one exception, Dr. White-Roath will decide how her time is allocated, working in conjunction with the PPT.

If the local or regional board of education or the unified school district responsible for providing special education for the student requiring special education does not take action on the findings or prescription of the hearing officer within fifteen days after receipt thereof, the State Board of Education shall take appropriate action to enforce the findings or prescription of the hearing officer.

Appeals from the hearing decision of the hearing officer may be made to state or federal court by either party in accordance with the provisions of Section 4-183, Connecticut General Statutes, and Title 20, United States Code 1415(e).

/s/ [Illegible]
Hearing Officer Signature

/s/ Christine B. Spak
Hearing Officer Name in Print

DCCT/NHCT
03cv1695
Smith
Squatrito

05-4168-cv
LA & GA v. Granby Bd. of Educ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 0.23 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER

IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the fifteenth day of May, two thousand and seven.

Present: HON. BARRINGTON D. PARKER,
HON. RICHARD C. WESLEY,
HON. PETER W. HALL,
Circuit Judges.

L.A. AND G.A., ON THEIR OWN BEHALF & AS PARENTS OF M.A.,

Plaintiffs-Appellants,

-v-

GRANBY BOARD OF EDUCATION,

Defendant-Appellee.

05-4168-cv,
05-6315-cv

(Filed May 15, 2007)

Appearing for Plaintiffs-Appellants: Lisa H. Anderson and Gordon N. Anderson, *pro se*, Granby, CT

Appearing for Defendant-Appellee: Michael Peter McKeon, Sullivan, Schoen, Campane & Connon, LLC, Hartford, CT

Appeal from the United States District Court for the District of Connecticut (Squatrito, *J.*; Thomas P. Smith, *M.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the June 30, 2005 judgment of the District Court be REVERSED, the October 19, 2005 judgment of the District Court be VACATED, and the *lis pendens* entered on April 7, 2005 be EXPUNGED.

Familiarity by the parties is assumed as to the facts, the procedural context, and the specification of appellate issues. After reviewing the magistrate judge's initial recommendation, his later "supplemental opinion" and the district court's acceptance and adoption of same, we reverse the June 30, 2005 judgment and vacate the October 19, 2005 judgment.

Background

Plaintiffs LA and GA, parents of a minor disabled child, retained counsel for Individuals with Disabilities in Education Act ("IDEA") claims brought before a state hearing officer against the defendant Granby Board of Education ("Board"). After their partial success in administrative proceedings, Plaintiffs sought attorneys' fees and costs before the United States District Court for the District of Connecticut (Smith, MJ; Squatrito, J.). Plaintiffs, through their attorneys, entered into settlement discussions with the Board, and appeared to have agreed to a settlement

of $25,000. When presented with the settlement documents, however, Plaintiffs changed their minds and refused to sign the papers.

The case went before Magistrate Judge Thomas P. Smith for what was styled as "a settlement discussion." After hearing testimony from Plaintiffs, the magistrate issued a short written opinion on April 7, 2005 (the "April Report"). In the April Report, the magistrate characterized Plaintiffs' behavior as "unfair, unreasonable, and inequitable," and awarded attorneys' fees to Plaintiffs' lawyers from Plaintiffs in the amount of $65,418. This was the amount Plaintiffs had demanded at the "settlement discussion" and was more than requested in their complaint for attorneys' fees ($39,254) and educational costs ($3,828.66). The magistrate "further f[ound] that the fees should be paid pursuant to the fee agreement which the [P]laintiffs entered into with their legal counsel." Finally, the magistrate dismissed the Plaintiffs' case with prejudice. He directed that "an order should enter dismissing this action forthwith" although he noted that "[f]urther factual findings shall issue in the normal course." The April Report contained no statement regarding the parties' rights to appeal the magistrate's determination to the district court within ten days as permitted under 28 U.S.C. § 636(b)(1). Finally, in a separately filed Notice of Lis Pendens, the magistrate also "[o]rder[ed] that the Plaintiffs' counsel file this Lis Pendens on the Land Records." The district court adopted the magistrate's

April Report[1] on June 30, 2005 in a one sentence opinion.

Plaintiffs, proceeding *pro se,* filed a notice of appeal with the district court on June 28, 2005, and with this Court on August 3, 2005.

On September 29, 2005, the magistrate filed what he styled a "supplemental memorandum, proposed findings of fact, and suggestion of lack of subject matter jurisdiction," which was "intended to assist in analyzing the record" (the "September Report"), The magistrate took the view that the "settlement conference" revealed that the lawsuit was "perpetuate[d] . . . for vindictive reasons," and Plaintiffs' conduct was "unfair and inequitable." The magistrate concluded that as the case had "been settled by virtue of a private contract entered into by the parties," he should dismiss the case because any federal claim for attorneys' fees under IDEA had "merged" with the settlement contract, and there was no basis for diversity jurisdiction over that contract. The magistrate further noted that while the settlement resolved the Board's liability for Plaintiffs' attorneys' fees, any remaining claims for fees by

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[1] Plaintiffs are not prevented from maintaining this appeal because they filed it with regard to the magistrate judge's report rather than that the district court's order. *See Sutton v. New York City Transit Auth.,* 462 F.3d 157, 160 (2d Cir. 2006) (holding that notice of appeal of magistrate's decision "may be regarded as a premature notice of appeal, which ripened into a proper notice of appeal upon the entry of the . . . judgment").

Plaintiffs' attorneys would be a contract matter to be resolved in state court. Finally, he advised Plaintiffs that they "may have a right to object" to the report under Federal Rule of Civil Procedure 72(b), and that failure to do so may bar further review. He did not, however, advise them that they only had ten days in which to object.

On October 19, the district court approved and adopted the September Report and dismissed with prejudice Plaintiffs' claims for lack of subject matter jurisdiction. The clerk entered a "supplemental judgment" dismissing the case with prejudice. Neither the district court's approval and adoption of the magistrate's report nor the clerk's supplemental judgment recited any judgment against Plaintiffs for attorneys' fees to their attorneys. Plaintiffs appealed this supplemental order on November 15, 2006.[2]

Analysis

The Board argues that we do not have jurisdiction to hear this case because, as we have held, parents generally cannot represent their children's IDEA claims *pro se*. *See, e.g., Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 285 (2d Cir. 2005). However, a parent "is, of course, entitled to represent himself on his claims that his *own* rights as a parent under the IDEA were violated. . . ." *Wenger v. Canastota*

[2] Plaintiffs also sought sanctions against the Board and their prior counsel, which we deny.

Cent. Sch. Dist., 146 F.3d 123, 126 (2d Cir. 1998), *cert. denied,* 526 U.S. 1025 (1999) (emphasis in original). We decide if a party is permitted to appear *pro se* by determining if this is the party's "own case or one that belongs to another." *Iannaccone v. Law,* 142 F.3d 553, 558 (2d Cir. 1998) (citations omitted). The attorneys' fees provision of the IDEA provides that the parents, not the child, will receive or pay attorneys' fees. 20 U.S.C. § 1415(i)(3)(B). As a result, the parents' rights under the IDEA are implicated here, and they may proceed *pro se. Wenger,* 146 F.3d at 126; *Iannaccone,* 142 F.3d at 558; *accord Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.,* 402 F.3d 332, 334 n.2, 336 (2d Cir. 2005) (permitting *pro se* parents to seek expert's fees in IDEA claim), *rev'd on other grounds by Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,* 126 S. Ct. 2455, 2461 (2006).

Next, we must determine whether Plaintiffs waived the ability to appeal the magistrate's decisions because they did not file objections before the district court. *See Small v. Sec'y of Health & Human Servs.,* 892 F.2d 15, 16 (2d Cir. 1989). It is arguable that no waiver occurred because the magistrate's decisions did not give them "clear notice" of the consequences of the failure to object, and their attorneys stopped representing them soon after the April Report.[3] *See Thomas v. Arn,* 474 U.S. 140, 155 (1985).

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[3] While Plaintiffs were represented by counsel when the magistrate's April Report was entered, their counsel soon thereafter sent Plaintiffs a letter advising them that they could

(Continued on following page)

In any event, because the waiver rule is "nonjurisdictional," we may "excuse the default in the interests of justice," and choose to do so here. *Id.*

Finally, we turn to the merits of Plaintiffs' appeal. In the April Report, the magistrate awarded attorneys' fees to Plaintiffs' lawyers from Plaintiffs and dismissed the case with prejudice as a result of the Plaintiffs' "unfair, unreasonable, and inequitable behavior." Pursuant to the statute, parents may be required to pay attorneys' fees "to a prevailing State educational agency or local educational agency . . . if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." *See* 20 U.S.C. § 1415(i)(3)(B)(i)(III). There is nothing in the IDEA, however, that gives federal courts the power to require parents to pay fees to their own counsel. A court's ability to impose attorneys' fees in this country is not unlimited. *Accord Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247-262 (1975); *see also Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 382 (1994) ("enforcement of [a] settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction"). The court

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file an appeal with this court, but would have to secure new counsel to do so. Nothing in that letter advised Plaintiffs that they could enter objections to the April Report with the district court.

erred in directing Plaintiffs to pay their own attorneys' fees.

The magistrate dismissed the complaint with prejudice.[4] We have long held that "outright *dismissal* for reasons not going to the merits is viewed with disfavor in the federal courts." *Nagler v. Admiral Corp.*, 248 F.2d 319, 322 (2d Cir. 1957); *see also Stern v. General Elec. Co.*, 924 F.2d 472, 477 (2d Cir. 1991). The court erred in dismissing Plaintiffs' case with prejudice.

The magistrate's September Report and the district court's October acceptance of that report must be vacated, as they were entered after the case had been dismissed and after the appeal filed.[5] A district court "terminate[s] its jurisdiction over [a] complaint" when it dismisses a case. *Ohio River Co. v. Carrillo*, 754 F.2d 236, 238 (7th Cir. 1985); *see also Corbett v. MacDonald Moving Servs., Inc.*, 124 F.3d 82, 88 (2d Cir. 1997). Furthermore, Plaintiffs' filing of an appeal "confer[ed] jurisdiction on the court of appeals and divest[ed] the district court of its control over those

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[4] A court may, under Federal Rule of Civil Procedure 41(b), dismiss a claim if a plaintiff does not comply with the Federal Rules or an order of the court. However, the magistrate neither cited this statute in his April Report nor did he find that Plaintiffs failed to comply with the Rules or any of his orders.

[5] We admit to being troubled by the September Report and October order, as it should have been apparent to both the magistrate and the district judge that they no longer had jurisdiction over this matter.

aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58 (1982); *see also Motorola Credit Corp. v. Uzan,* 388 F.3d 39, 53 (2d Cir. 2004). We finally note that even though the October order appeared to reverse, *sub silentio,* the award of the attorneys' fees, the court did not expunge the *lis pendens.* We thus direct the court to expunge the *lis pendens* filed as a result of Magistrate Smith's April 7, 2005 order. Finally, Plaintiffs' requests for sanctions against defense counsel and their own counsel are denied.

Accordingly, the June 30, 2005 judgment of the District Court adopting the magistrate judge's April 7, 2005 report and recommendation is hereby REVERSED AND REMANDED, and the district court's October 19, 2005 order accepting the magistrate judge's September 20, 2005 "supplemental opinion" is VACATED. Plaintiffs' motion for sanctions is DENIED. Finally, we order the court to EXPUNGE the *lis pendens* that was filed on April 7, 2005.

FOR THE COURT:

Thomas Asreen, Acting Clerk

By:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Catherine O'Hagan Wolfe
CLERK

Date:	2/15/08
Docket Number:	07-4329-cv
Short Title:	A. v. Granby Bd of Ed
DC Docket Number:	03-cv-1695
DC:	CONNECTICUT (NEW HAVEN)
DC Judge:	Honorable Dominic Squatrito

PRO SE APPEAL SCHEDULING ORDER #1

MAKE ALL TELEPHONE INQUIRES TO
(212) 857-8526

(Filed Feb. 15, 2008)

Noting that *appellant* has filed a notice of appeal, *pro se*:

IT IS HEREBY ORDERED that the district court shall be responsible for filing the record on appeal on or before **N/A**.

IT IS FURTHER ORDERED that appellant's brief and appendix, which shall be filed in typewritten form, shall be served and filed on or before **03/17/2008**. If appellant's brief does not exceed ten (10) pages, it shall be filed in memorandum form.

IT IS FURTHER ORDERED that the appellee's brief shall be served and filed on or before **04/17/2008**. If appellee's brief does not exceed 10 pages, it shall be filed in memorandum form.

IT IS FURTHER ORDERED that 10 copies of each brief, memorandum or appendix shall be filed with the Clerk.

IT IS FURTHER ORDERED that the appellee may, without further order of the court, file 10 copies of an appendix to its brief, or 10 copies of attached to its memorandum.

IT IS FURTHER ORDERED that the argument of the appeal may be heard as early as the week of **05/27/2008**. All counsel should immediately advise the Clerk by letter of the dates thereafter that they are unavailable for oral argument. The time and place of oral argument may be separately noticed by the Clerk to counsel.

IT IS FURTHER ORDERED that in the event of default by appellant in timely filing the record on appeal, or the appellant's brief and appendix, or memorandum and appendix, or upon default by appellant regarding any other provision of this order, the appeal may be dismissed forthwith without further notice.

IT IS FURTHER ORDERED that if the appellee fails to file a brief or memorandum within the time

directed by this order, the appellee may be subject to such sanctions as the court may deem appropriate.

Catherine O'Hagan Wolfe, Clerk

By: /s/ [Illegible]
Lynette Rodriguez
Deputy Clerk, USCA

Dated: 2/15/2008

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of December, two thousand and eight,

---

L.A., on their own behalf & as parents of M.A., G.A., on their own behalf & as parents of M.A.,

Plaintiffs-Appellants,

v.

Granby Bd. of Ed.,

Defendant-Appellees.

ORDER
Docket Number:
07-4329-cv

(Filed Dec. 10, 2008)

L.A., on their own behalf & as parents of M.A., G.A., on their own behalf & as parents of M.A. having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Franklin Perez
Frank Perez, Deputy Clerk

USCA2 Docket Sheet for 07-4329 (as of Jan. 15, 2009)

General Docket
US Court of Appeals for the Second Circuit

Second Circuit Court of Appeals

INDIV
CLOSED

Court of Appeals Docket #: 07-4329-cv

Nsuit: 3440 CIVIL RIGHTS – Other

A. v. Granby Bd of Ed Filed 10/5/07

Appeal from: CONNECTICUT (NEW HAVEN)

Case type information:

Civil

Private

None

Lower court information:

District: 03-cv-1695

Trial Judge: Dominic J. Squatrito

MagJudge:

Date Filed: 10/03/03

Date order/judgment: 07/23/2007

Date NOA filed: 08/20/2007

Fee status: Paid

Panel Assignment:

Panel: JON JAC BDP 500 Pearl

Date of decision: 10/10/08

Prior Cases: NONE

Current cases NONE

Official Caption[1]

Docket No. [s] : 07-4329-cv

L.A., on their own behalf & as parents of M.A., G.A., on their own behalf & as parents of M.A.,

Plaintiffs-Appellants,

v.

Granby Bd. of Ed.,

Defendant-Appellee.

Authorized Abbreviated Caption[2]

Docket No. [s] : 07-4329-cv

A. v. Granby Bd of Ed

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[1] Fed. R. App. P. Rule 12[a] and 32[a].

[2] For use on correspondence and motions only.

A.	A.
Plaintiff-Appellant	n/a xxx xxx xxx xxx xxx xxx xxx-xxx-xxx
L.A.	L.A.
Plaintiff-Appellant	n/a xxx xxx xxx xxx xxx xxx Anderson999@att.net
Granby Board of Education	Michael P. McKeon Esq.
Defendant-Appellee	[LD ret] Sullivan, Schoen, Campane &, Connon 646 Prospect Ave. Connon Hartford , CT , 06105 203-233-2141

10/5/07	Copy of notice of appeal and district court docket entries on behalf of APPELLANT G. A., L.A., filed. [Entry date Oct 11 2007] [LR]
10/5/07	Copy of District Court Docket entries and AMENDED NOTICE OF APPEAL on behalf of APPELLANT G.A., L.A., filed. [Entry date Oct 11 2007] [LR]
10/5/07	Copy of district court dated 8/20/07, order RECEIVED. [Entry date Oct 11 2007] [LR]

10/11/07	Note PRIOR case number(s) : 05-4168-cv(L) [Entry date Oct 11 2007] [LR]
10/11/07	Instructional Forms sent to Pro Se litigant [Entry date Oct 11 2007] [LR]
10/19/07	Notice of appeal acknowledgment letter from G.A., L.A. received. [Entry date Oct 19 2007] [LR]
10/19/07	Notice of appeal acknowledgment letter from G.A., L.A. received. [Entry date Oct 19 2007] [LR]
10/19/07	Letter stating, "we do not wish our present appellate case to be sealed.", from APPELLANT G.A., L.A., received. [Entry date Oct 19 2007] [LR]
10/19/07	Letter filed from Appellants stating the appellants will be traveling outside of the continential [sic] United States from December 5-12, 2007. (Forwarded a copy to Calendar.) [Entry date Oct 19 2007] [LR]
10/19/07	Certificate of Service RECEIVED [Entry date Oct 19 2007] [LR]
11/5/07	Index in lieu of Record on Appeals Electronically Filed (Original documents remain in the originating court). [Entry date Nov 5 2007] [LR]
2/15/08	Scheduling order #1 filed. Appellants brief due 3/17/2008. Appellees brief due 4/17/2008. Ready week 5/27/2008. [Entry date Feb 15 2008] [LR]

2/15/08	Notice to counsel and pro se litigant: re: Scheduling order 1. [Entry date Feb 15 2008] [LR]
3/20/08	APPELLANT G.A., L.A., brief FILED with proof of service. Proof of service is attached to the inside of brief covers. [Entry date Mar 21 2008] [AG]
3/20/08	APPELLANT G.A., L.A., appendix filed w/pfs. [Entry date Mar 21 2008] [AG]
5/1/08	Letter Sent to Appellee requesting a response in regards to filing a brief. [Entry date May 1 2008] [AG]
6/25/08	Local Rule 34 Notice Sent to Pro Se. [Entry date Jun 25 2008] [JM]
6/25/08	Local Rule 34 Notice Sent to Counsel. [Entry date Jun 25 2008] [AG]
6/26/08	Letter Sent to Appellee requesting a response in regards to filing a brief. [Entry date Jun 26 2008] [RR]
7/1/08	Local rule 34 questionare [sic]: Oral arguments in pro se cases from APPELLANT L.A., received. [Entry date Jul 7 2008] [RR]
7/7/08	Argument Requested – Local Rule 34 Acknowledgment Returned by APPELLANT L.A. , [Some parties seek oral argument] [Entry date Jul 7 2008] [CI]

7/22/08 The new case manager assigned to this case is: Gonzalez, Armando, [Entry date Jul 22 2008] [RR]

7/22/08 Appellee Granby Board of Education motion to dismiss the appeal, filed with proof of service. [Entry date Jul 22 2008] [AG]

7/22/08 Appellee Granby Board of Education motion for extended time to file brief, filed with proof of service. [Entry date Jul 23 2008] [AG]

7/28/08 Notice to counsel/Pro Se Order dated 7/28/08. [Entry date Jul 28 2008] [AG]

7/28/08 Order FILED GRANTING motion extended time by Appellee Granby Board of Education, endorsed on motion dated 7/22/2008 Extended Ready week is 5/27/2008. [Entry date Jul 28 2008] [AG]

8/4/08 Appellant A. (Pro Se), Appellant A. (Pro Se), in opposition to motion dismiss the appeal and in opposition to order for extension of time, filed with proof of service. [Entry date Aug 7 2008] [AG]

8/29/08 SEALD [sic] Record on appeal filed. (Original papers of district court.) Volume(s) (1) [Entry date Aug 29 2008] [VM]

10/10/08 Notice to counsel/Pro Se Order dated 10/10/08. [Entry date Oct 10 2008] [AG]

10/10/08	Order FILED GRANTING motion dismiss the appeal by Appellee Granby Board of Education, endorsed on motion dated 7/22/2008 [Entry date Oct 10 2008] [AG]
10/24/08	Appellant A., Appellant L.A. Petition for rehearing and petition for rehearing en banc filed with proof of service. [Entry date Oct 24 2008] [AG]
12/10/08	Notice to counsel/Pro Se of Order dated 12/10/08. [Entry date Dec 10 2008] [AG]
12/10/08	Order FILED DENYING motion Petition for rehearing by Appellant A., Appellant L.A., endorsed on motion dated 10/24/2008, Order FILED DENYING motion petition for rehearing en banc by Appellant A., Appellant L.A., endorsed on motion dated 10/24/2008 [Entry date Dec 10 2008] [AG]
1/5/09	Copy of order dated October 10, 2008 re-sent to the district court at the request of Appellant. [Entry date Jan 5 2009] [JC]
1/5/09	Certified copy of order dated 12/10/08 disposing of the appeal issued to district court. [Mandate] [Entry date Jan 5 2009] [AG]
1/5/09	Notice to counsel/Pro Se of Mandate issued in case. [Entry date Jan 5 2009] [AG]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

L.A. and G.A. on their own behalf and as parents of M.A.

Plaintiffs

v.

CIVIL CASE NO. 3:03cv1695 (DJS)

Granby Board of Education

Defendant.

NOTICE OF APPEAL

1. Pursuant to F.R.A.P. 4(a)(1), L.A. and G.A. (appealing party) hereby gives notice and appeals to the United States Court of Appeals for the Second Circuit from the following Judgment or Order (attach the Judgment or Order):

Electronic Order – Doc. #57 attached

---

2. The Judgment/Order in this action was entered on 7-23-07 (date).

/s/ L.H. Anderson
Signature

/s/ Lisa H. Anderson
Print Name

xxx xxx xxx
xxx xxx xxx
Address

xxx-xxx-xxx
Telephone Number

Date: 8-20-07

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

L.A. and G.A. on their own behalf and as parents of M.A.

Plaintiffs

v.

Granby Board of Education

Defendant.

CIVIL CASE NO.
3:03cv1695 (DJS)

[Amended]
NOTICE OF APPEAL

1. Pursuant to F.R.A.P. 4(a)(1), L.A. and G.A. [Lisa H. Anderson Gordon N. Anderson] (appealing party) hereby gives notice and appeals to the United States Court of Appeals for the Second Circuit from the following Judgment or Order (attach the Judgment or Order):

Memorandum of Decision and Order – Doc. No. 65

---

2. The Judgment/Order in this action was entered on 8-20-07 (date).

/s/ L.H. Anderson, pro se
Signature

/s/ Lisa H. Anderson
Print Name

xxx xxx xxx
xxx xxx xxx
Address

xxx-xxx-xxx
Telephone Number

Date: 9-4-07

07-4329-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

L.A. ON THEIR OWN BEHALF
& AS PARENTS OF M.A.,
G.A. ON THEIR OWN BEHALF
& AS PARENTS OF M.A.,

Plaintiffs-Appellants,

v.

GRANBY BOARD OF EDUCATION,

Defendant-Appellee.

ON APPEAL from the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF for the
PRO SE PLAINTIFFS-APPELLANTS

Lisa H. Anderson, Pro Se
Gordon N. Anderson, Pro Se
xxx xxx xxx
xxx xxx xxx
xxx-xxx-xxx

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Connecticut (Dominic J. Squatrito, J.) had jurisdiction under 20 U.S.C. § 1415(i)(2) and (3). The district court ruled in favor of the Defendant Board of Education, denying Plaintiffs' petition for reimbursement of costs and attorneys' fees related to an underlying due process action and, denying costs related to their fees

petition in federal court (Case #3:03-cv-1695). **Complaint, PA-130-167**

Plaintiffs prevailed in their pro se appeal to the United States Court of Appeals for the Second Circuit, USCA Case #05-4168-cv, 05-6215-cv. On May 15, 2007, the court filed a detailed summary order stating,

> **"UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the June 30, 2005 judgment of the District Court be REVERSED, the October 19, 2005 judgment of the District Court be VACATED, and the *lis pendens* entered on April 7, 2005 be EXPUNGED." Sum. Order, PA-3**

On June 14, 2007, district court Case #3:03-cv-1695 was reopened in response to the Second Circuit Court of Appeals Mandate. **Docket, PA-16** The parties were ordered to file a written status report on or before July 20, 2007. Plaintiffs (parents) timely-filed their status report on Tuesday, July 17, 2007. They asserted that their motion for summary judgment, filed in April, 2004, **(Doc #16, PA-100)** is pending, and requested that the court grant them judgment as a matter of law. **Status Report, PA-21, 22** The Defendant (Board of Education) did not comply. On Monday, July 23, 2007, a status report appeared at the courthouse for untimely, manual filing by the Defendant. **Def. Status Report, PA-26 to 40.** On the same day, the district court issued an order that provides the basis for appellate jurisdiction.

"NOTICE OF ELECTRONIC ORDER. THIS IS THE ONLY NOTICE THE COURT SHALL ISSUE. The court has reviewed the status reports submitted by the parties. In light of the Summary Order of the U.S. Court of Appeals for the Second Circuit: (1) the Defendant's request to deny the Plaintiffs' demand for fees and costs is DENIED; and (2) the Defendant's request for permission to file a motion pursuant to 20 U.S.C. S 1415(i)(3)(B) is DENIED without prejudice. In their Status Report, the Plaintiffs represent that they have a motion for summary judgment (dkt. # 16) pending before the court. The court notes, however, that all pending motions, including the Plaintiffs' motion for summary judgment (dkt # 16), were terminated once this case was dismissed. Nevertheless, in the interest of fairness, the court shall allow the parties to refile their dispositive motions. Therefore, the court ORDERS the following: (1) all dispositive motions shall be filed on or before September 7, 2007; (2) if no dispositive motion is filed on or before September 7, 2007, the parties shall file their joint trial memorandum on or before October 1, 2007 and this case shall be trial ready in November 2007; (3) if a dispositive motion is filed, the court shall set the date for the filing of the joint trial memorandum and the trial date following the court's resolution of that dispositive motion. IT IS SO ORDERED. Signed by Judge Dominic J. Squatrito on 07/23/07. (S-Ring, P.)

(Entered: 07/23/2007)" **Order Doc #57, PA-25**

Plaintiffs timely-filed a Motion for Reconsideration, a Demand for Trial By Jury, a Notice of Appeal (filed on August 20, 2007), and once the district court had ruled on the Motion for Reconsideration, an Amended Notice of Appeal. (filed on September 4, 2007). **NOA Doc #63, PA-41 to 43; Mot. for Reconsid. Doc #59, PA-44; Demand for Trial by Jury Doc #61, PA-67; Amended NOA, PA-70 to 93; Mem. of Dec. and Order Doc #65, PA-72.**

The interlocutory order, Doc. #57 shown above, permits appellate review of USCA Case #07-4329-cv under 28 U.S.C. 1291 and the collateral order doctrine. The Second Circuit outlined the standard for determining whether an order qualifies for collateral order review,

> "Although the decision here appealed from – namely the district court's order holding the Newspapers' intervention motion in abeyance – was not a final judgment, the Newspapers assert that this Court nonetheless has jurisdiction under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, (1949)*, "a narrow exception to the general rule that interlocutory orders are not appealable as a matter of right." *Schwartz v. City of New York, 57 F.3d 236, 237 (2d Cir. 1995).* To fit within the collateral order exception, the interlocutory order must: [i] conclusively determine the disputed question, [ii] resolve an important

> issue completely separate from the merits of the action, and [iii] be effectively unreviewable on appeal from a final judgment." *United States v. Graham, 257 F.3d 143, 147 (2d Cir. 2001* (internal quotation marks and citations omitted; alteration in original)."
>
> *Lugosch v. Pyramid Co. of Onondaga, ___ F.3d ___, 2006 WL 45865 (2d Cir. Jan 10, 2006)*

Here, the district court's interlocutory order **(Doc. #57, PA-25)** [i] conclusively determines the disputed question of whether the Plaintiffs' Motion for Summary Judgment, filed in April, 2004, (Doc. #16, PA-100) is pending. By stating,

> "The court notes, however, that all pending motions, including the Plaintiffs' motion for summary judgment (dkt # 16), were terminated once this case was dismissed. Nevertheless, in the interest of fairness, the court shall allow the parties to re-file their dispositive motions. Therefore the court ORDERS the following: (1) all dispositive motions shall be filed on or before September 7, 2007 . . . " **(Doc 57)**

the trial court is ruling that the April, 2004 summary judgment "dispositive motion" is no longer at issue. All of the Plaintiffs' federal claims have been dismissed in summary judgment without an award of the relief sought. Indeed it is clear that the district court's decision here, did conclusively resolve a disputed issue – whether the Plaintiffs' motion for

summary judgment (Doc. #16) is pending – and accordingly, the first prong of the collateral order doctrine is satisfied.

The interlocutory order **(Doc. #57)** [ii] resolves issues – regarding the Plaintiffs' right to due process – that are completely separate from the merits of the action. In considering the appropriateness of summary judgment, the United States Supreme Court has held:

> "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules [of Civil Procedure] as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. at 327 (citing Fed. R. Civ. P. 1).

Conversely, here, the district court has held the Plaintiffs' uncontroverted summary judgment motion **(Doc. #16)** in abeyance in a sealed case file, since April of 2004, rather than quickly, justly and inexpensively resolving the case in accordance with Federal Rule of Civil P. 56, and Local Rule 56 (D. Conn. L. Civ. R. 56). Citizens of the United States have a fundamental right to expect the courts to act, and to require litigants to act, in accordance with established and known procedures. This extraordinary handling of the Plaintiffs' federal claims and motion, constitutes a breach of the their [sic] right to the due process of law as embodied in the Fifth and Fourteenth Amendments to the Constitution. The

order that "all dispositive motions shall be filed on or before September 7, 2007 . . . " is an outright dismissal of Plaintiffs' pending motion as well as their Constitutional entitlement! Therefore it does indeed, resolve an important issue completely separate from the merits of the action, satisfying the second requirement for collateral order review.

Finally, the interlocutory order (Doc. #57) establishing new pre-trial deadlines versus the court's order on Pretrial Deadlines filed on October 3, 2003 **(Docket Doc #2, PA-11)**, creates an un-noticed, and manifestly unjust burden of requiring the Plaintiffs to litigate a second case against the Defendant Granby Board of Education. The district court's invitation that " . . . Nevertheless, in the interest of fairness, the court shall allow the parties to re-file their dispositive motions," attempts to hide from the pro se parents, that all of their federal claims have already been dismissed with prejudice.

Fed. R. Civ. P. 41(b) governs the effect of an involuntary dismissal of a plaintiff's action. It reads:

> "If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule – except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 – operates as an adjudication on the merits."

In *Semtek International Incorporated v. Lockheed Martin Corporation,* 531 U.S. 497 (2001), the Supreme Court noted that judgment on the merits within the meaning of Rule 41(b) is not necessarily entitled to claim-preclusive effect. The court noted that an ajudication [sic] on the merits is equivalent to a dismissal of an action with prejudice. Thus, the court held that an "adjudication on the merits" pursuant to Rule 41(b) bars a plaintiff from returning later to the same court and filing the same claim. *Semtek,* 531 U.S. at 1027; see also *Smith v. Woosley,* 399 F.3d 428, 435 (2d Cir. 2005) ("All Rule 41(b) means . . . is that a federal court's dismissal with prejudice of a time-barred claim means that the claim may not be re-filed in the court that dismissed the claim").

The courts' dismissal of Plaintiffs' April, 2004 motion for summary judgment per orders issued on July 23, 2007 (Doc. #57) constitutes dismissal of Plaintiffs' first "action" with prejudice. Therefore, if the Plaintiffs were to "re-file" the action for a second time in the same court against the same defendants based on the same underlying claim, in accordance with *Semtek,* such an action is barred by the preclusive effect of the court's adjudication in the first action.

Additionally, rather than moving the litigation toward final resolution, the interlocutory order (Doc #57) creates additional proceedings, and delays the vindication of important public interests,

> " . . . to ensure that all children with disabilities have available to them a free appropriate public education . . . and to ensure that the rights of children with disabilities and parents of such children are protected" 20 U.S.C. § 1400(d)(1)(A) and (B)

By the time a final judgment is entered, the burden of the additional trial will have been suffered by the Plaintiffs, and the statutory rights of children with disabilities and parents of these children will have been forestalled. The interlocutory order is therefore, effectively unreviewable on appeal from a final judgment, satisfying the third prong of the collateral order doctrine.

Plaintiffs pray that the United States Court of Appeals conducts a *de novo* review of these federal proceedings, that the Court will enter summary judgment as a matter of law in favor of the Plaintiffs-Appellants, and that it will make the award attorney fees and costs. Plaintiffs have hereto appended as reference, a recent opinion concerning federal claims pursuant to IDEA and fee awards in their "community" *CC v. Granby Board of Education,* ___ F. Supp. 2d ___ 2006 U.S. Dist. LEXIS 73420 (D. Conn. 2006), **PA-168 to 185**.

STATEMENT OF THE ISSUES

1. Whether the district court properly resolved Plaintiffs' motion for summary judgment that was filed in April of 2004. (Doc #16).

2. Whether the district court improperly ruled or abused its discretion by denying reimbursement of attorneys' fees and costs to the Plaintiffs.

3. Whether orders issued by the district court after Plaintiffs filed their Notice of Appeal **(Doc #63, PA-41)** and Amended Notice of Appeal **(Doc #67, PA-70)** should be vacated.

4. Whether the district court's disposition of Plaintiffs' motion for summary judgment (Doc#16) pursuant to Orders issued on July 23, 2007 (Doc #57) constitutes judgment on the merits, thereby, permitting the United States Court of Appeals for the Second Circuit to conduct a *de novo* review and make an award of fees and costs sought by the Plaintiffs pursuant to IDEA. (See *CC v. Granby Board of Education* ___ F.Supp. 2d ___ 2006 U.S. Dist. LEXIS 73420 (D. Conn. 2006), PA-168-185 attached for reference regarding fees awards in Plaintiffs' community.)

5. Whether the Defendant should be sanctioned for disobeying Federal and Local rules and for purposefully protracting the federal proceedings.

STATEMENT OF THE CASE

Pro se Plaintiffs-Appellants, L.A. and G.A., achieved prevailing party status in a due process action against Defendant-Appellee, Granby Board of Education. The due process action concerned the

education rights of the Plaintiffs' learning disabled child.

On October 3, 2003 Plaintiffs' counsel filed a complaint in the United State District Court, District of Connecticut, seeking an award of reasonable attorneys fees and costs pursuant to IDEA (Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*), and seeking an order that the Defendant reimburse the Plaintiffs for certain educational costs as ordered by the administrative hearing officer in a due process hearing decision dated September 8, 2003 **(Complaint Doc#1, PA-136 to 154)**. Plaintiffs also sought an award of attorneys' fees and costs in connection with the fees petition in District Court. **(Complaint Doc #1, PA-130 to 167).**

The district court dismissed Plaintiffs' claims with prejudice. Plaintiffs won a pro se appeal in the United States Court of Appeals for the Second Circuit **(Summary Order, PA-3)**. Upon remand, the district court issued orders (Doc #57), once again, dismissing Plaintiffs' claims and their pending motion for summary judgment (Doc #16), and Plaintiffs are making a second appeal to the Second Circuit in this matter, USCA Case #07-4329-cv.

STATEMENT OF THE FACTS and ARGUMENT

Plaintiffs' cause of action and legal argument is fully-briefed and timely-filed pursuant to the ORDER on Pre-trial deadlines dated October 3, 2003, and they have repeatedly asked the district court to grant

them a favorable judgment as a matter of law. **(Complaint Doc #1, PA-130; ORDER on Pre Deadlines Doc #2, PA-11; Motion for Summary Judgment Doc #16, PA-100; Status Report Doc #55, PA-22).**

Defendants had sufficient notice and opportunity to be heard, yet never responded to, or contraverted [sic] facts set forth in, Plaintiffs' summary judgment documents **(Motion Doc #16, PA-100; Mem. In Support of Plaintiffs Motion Doc #17, PA-102 to 121; Material Facts Not in Dispute Doc #18, PA-122 to 129; Docket PA-10 to 20).**

Defendants assert in their status report that they informed the district court "telephonically on July 6, 2004 that the parties had resolved the litigation and were working to finalize settlement papers", yet there is no indication of this on the docket sheet" **(Def's Status Report Doc #58, PA-31; Docket, PA-13).** Local rules state,

> "When counsel of record report to the Court that a civil action pending on its docket has been settled between the parties and no closing papers are filed within thirty (30) days thereafter, the Clerk shall enter an order of dismissal. Said dismissal shall be without costs and without prejudice to the right of any of the parties thereto to move within thirty (30) days thereafter to reopen if settlement has not, in fact, been consummated."
> **D. Conn. L. Rule 41(b)**

The Clerk made no order of dismissal. Further, on April 7, 2005 the docket shows a minute entry for a

settlement conference held before Magistrate Judge Smith, stating, "The case did not settle." These facts belie the persistent allegations by the Defendant that a settlement had been reached in July of 2004.

In the 26(f) Planning Report the parties requested an early settlement conference with either Article III Judge Squatrito, or with a magistrate judge. Plaintiffs did not consent to any other referral of jurisdiction, nor did counsel file forms with the clerk indicating that parties knew they could have withheld their consent. Without consent, and in accordance with 28 U.S.C. 636(c), Fed. R. Civ. P. 73, and D. Conn. L. Civ. R. 72(1)C)(5), Magistrate Judge Smith was precluded from sharing any information about the parties or the proceedings with the Article III Judge assigned to the case. His involvement, pursuant to the procedural Rules, lawfully concluded on April 7, 2005 with the minute entry stating, "The case did not settle." **(Order of Reference Doc #22, PA-94 to 95; Affidavit of Lisa H. Anderson, PA-96 to 97; Affidavit of Gordon N. Anderson, PA-98 to 99; Minute Entry Doc #31, PA-13)**

The docket sheet provides additional evidence that jurisdiction over district court case 3:03-cv-1695 remained with Article III Judge Dominic Squatrito. Docket entries 49-58 show that the Article III Judge had jurisdiction upon remand from Plaintiffs' first pro se appeal, USCA Case #05-4168-cv. **(Docket, PA-16)** Local rules provide,

> "Whenever an appellate Court has remanded a matter to the District Court, and further proceedings not requiring the trial of an issue of fact are appropriate, an application with reference thereto, whether made upon the motion calendar or otherwise, shall be referred for such further proceedings to the Judge who heard the matter below unless the Chief Judge or the appellate Court otherwise directs." **D. Conn. L. Civ. R. 40(c)**

Strangely, the Defendant asserts in their Status Report, filed on July 23, 2007 that, " . . . aspects of *Judge Smith's ruling* were left undisturbed by the Second Circuit. [emphasis added]" The Defendant puffed arrogantly that,

> "Those aspects of the trial court's memoranda and subsequent judgments with which the Second Circuit found fault were, quite frankly, extraneous to what the Board considered to be the heart of Judge Smith's ruling, namely his finding that 'the plaintiffs have engaged in unfair, unreasonable, and inequitable behavior' and as a consequence the Board was not obligated to pay them any fees or costs." **(Def's Status Report Doc #58, PA-26 to 40)**

The appellate court made no endorsement of "Judge Smith's ruling". The Summary Order states,

> "(enforcement of [a] settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction"). The court erred in directing Plaintiffs to pay their

own attorneys fees." **(Summary Order, PA-7)**

"The magistrate dismissed the complaint with prejudice.[4] We have long held that "outright dismissal for reasons not going to the merits is viewed with disfavor in the federal courts." *Nagler v. Admiral Corp., 248 F.2d 319, 322 (2d Cir. 1957)*; *see also Stern v. General Elec. Co., 924 F.2d 472, 477 (2d Cir. 1991).* The court erred in dismissing Plaintiffs' case with prejudice . . . "

[4]A court may, under Federal Rule of Civil Procedure 41(b), dismiss a claim if a plaintiff does not comply with the Federal Rules or an order of the courts. However, the magistrate neither cited this statute in his April Report nor did he find that Plaintiffs failed to comply with the Rules or any of his orders." **(Summary Order, PA-8)**

"The magistrate's September Report and the district court's October acceptance of that report must be vacated, as they were entered after the case had been dismissed and after the appeal filed.[5]

"[5]We admit to being troubled by the September Report and October order, as it should have been apparent to both the magistrate and the district judge that they no longer had jurisdiction over this matter." **(Summary Order, PA-8)**

"Accordingly, the June 30, 2005 judgment of the District Court adopting the magistrate

> judge's report and recommendation is hereby REVERSED AND REMANDED, and the District Court's October 19, 2005 order accepting the magistrate judge's September 20, 2005 "supplemental opinion" is VACATED. Plaintiffs' motion for sanctions is DENIED. Finally, we order the court to EXPUNGE the *lis pendens* that was filed on April 7, 2005." **(Summary Order, PA-9)**

Despite these admonitions by the Second Circuit, the district court has ordered once again, that the Plaintiffs' federal claims be dismissed with neither mention of the merits nor of Plaintiffs' failure to comply with Rules and orders. (Doc #57, PA-25). And unbelievably, the Defendant's Status Report of July 23, 2007 (Doc #58, PA-26 to 40) is replete with the same unfounded allegations, conclusory and out-of-court statements, and inadmissible evidence that was proffered by the Defendant before the Plaintiffs' first pro se appeal, USCA Case #05-4168-cv.

Also in the Status Report **(PA-34 and 35)**, Defendants allege that Plaintiffs waived their ability to make an appeal by not objecting to Judge Smith's rulings. This issue was properly addressed during the first appeal USCA 05-4168-cv,

> "The district court adopted the magistrate's April Report[1] on June 30 2005 in a one sentence opinion."
>
> "[1]Plaintiffs are not prevented from maintaining this appeal because they filed it with regard to the magistrate judge's report rather

> than the district court's order. See *Sutton v. New York City Transit Auth.*, 462 F.3d 157, 160 (2d Cir. 2006) (holding that notice of appeal of magistrate's decision "may be regarded as a premature notice of appeal, which ripened I [sic] into a proper notice of appeal upon the entry of the . . . judgment"). **(Summary Order, PA-4)**
>
> "It is arguable that no waiver occurred because the magistrate's decisions did not give them "clear notice" of the consequences of the failure to object, and their attorneys stopped representing them soon after the April Report.[3]
>
> "[3]While Plaintiffs were represented by counsel when the magistrate's April Report was entered, their counsel soon thereafter sent Plaintiffs a letter advising them that they could file an appeal with this court, but would have to secure new counsel to do so. Nothing in that letter advised Plaintiffs that they could enter objections to the April Report with the district court." **(Summary Order, PA-7)**

Plaintiffs continue to seek adjudication of their federal claims through their pending motion for summary judgment filed in April of 2004 (Doc #16, PA-100). Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment shall be granted when the moving party sustains its burden of showing that there is no genuine issue as to any material fact and that it is entitled to judgment as a

matter of law. See also *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). In considering the appropriateness of summary judgment, the united States Supreme Court has held: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules [of Civil Procedure] as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett,* 477 U.S. at 327 (citing Fed. R. Civ. P. 1). In adjudging a motion for summary judgment, the "mere existence of factual issues – where those issues are not material to claims before the court – will not suffice to defeat a motion for summary judgment." *Quarles v. General Motors Corp.,* 758 F.2d 839, 840 (2d Cir. 1985).

While it is true that "[I]f the party opposing summary judgment 'generates uncertainty as to the true state of any material fact, the procedural weapon of summary judgment is inappropriate,'" *National Union Fire Ins. Co. v. Turtur,* 892 F2d 199, 203 (2nd Cir. 1989) (quoting *Beacon Enterprises, Inc. v. Mensies,* 715 F.2d 757,762 (2nd Cir. 1983)), "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-248 (1986). Consequently, neither "conclusory statements, conjecture, [n]or speculation" will suffice

to defeat summary judgment. *Kulak v. City of New York,* 88 F.3d 63, 71 (2d Cir. 1996).

CONCLUSION

The appellate issues framed by the parties are issues of pure law, and they are fully briefed by counsel and pro se Plaintiffs. The court may conclude that the record evidence fails to raise a triable question of fact that is material to the issue of whether the Plaintiff parents should be reimbursed for reasonable attorneys fees and costs pursuant to IDEA. Wherefore, for all of the reasons discussed in this brief, and contained in the Complaint (Doc #1, PA-130 to 167) and summary judgment motion (Doc #16, #17, #18; PA-100, 102, and 122 respectively), the Plaintiffs request the following:

1) That summary judgment be granted in favor of the Plaintiffs on all of their federal claims, and that the Appellees be ordered to reimburse them for reasonable attorney fees and costs related to educational expenditures as stated in the Complaint **(Doc #1, PA-130 to 167)** and costs related to all federal court proceedings related to this matter (District Court Case #3:03-cv-1695, USCA Case #05-4168-cv, USCA Case #05-6315-cv, USCA Case #07-4329-cv) and any related future proceedings.

2) That district court orders issued on July 23, 2007 (Doc. #57) be vacated because Plaintiffs motion for summary judgment (Doc #16) is

still pending and the Order on Pre-trial Deadlines filed on October 3, 2003 **(Doc #2, PA-11)** is still in force. The parties' due process rights are afforded by that pre-trial order. It lawfully provides notice and a full and fair opportunity for the parties to be heard.

3) That district court orders, decisions and judgments issued after Plaintiffs filed their Notice of Appeal **(Doc. #63, PA-41)** be vacated, because Plaintiffs Notice of Appeal divested the district court of its authority to issue those orders, decisions and judgments pursuant to Federal Rule of Appellate Procedure 4 and Federal Rule of Appellate Procedure 10.

4) That the court, in its discretion, award any additional relief to compensate the Plaintiffs' family for the time and resources they have expended, and for the longstanding distress they have endured in asserting their Constitutional and statutory rights versus Granby Board of Education.

5) That the court sanction the Defendant Board of Education for their willful disregard for Federal and Local Rules of Civil Procedure and for their sustained and purposeful protraction of these federal court proceedings.

Dated this 16th day of March, 2008, at Granby, Connecticut.

/s/ L.H.A.	/s/ GNA/lha
Lisa H. Anderson,	Gordon N. Anderson,
Pro Se	Pro Se
xxx xxx xxx	xxx xxx xxx
xxx xxx xxx	xxx xxx xxx
xxx-xxx-xxx	xxx-xxx-xxx

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Caption [use short title]

L.A. v. GRANBY BOARD OF ED.

Docket Number(s): 07-4329-CV

Motion for: Defendant-Appellee's Motion to Dismiss

Set forth below precise, complete statement of relief sought:

Defendant-Appellee seeks the dismissal of the present appeal on the grounds that it is not an appeal of a final judgment as required under 28 U.S.C. Sec. 1291, nor does it fall within the ambit of the collateral order doctrine.

MOVING PARTY: Defendant-Appellee

☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Plaintiff-Appellant

MOVING ATTORNEY: Michael P. McKeon

[name of attorney, with firm, address, phone number and e-mail]

Sullivan, Schoen, Campane & Connon, LLC
646 Prospect Avenue
Hartford, Connecticut 06105-4286
(860) 233-2141
mmckeon@sscc-law.com

OPPOSING ATTORNEY [Name]: Lisa H. Anderson, Pro Se

[name of attorney, with firm, address, phone number and e-mail]

xxx xxx xxx
xxx xxx xxx

Court-Judge/Agency appealed from:

Please check appropriate boxes:

Has **consent** of opposing counsel:
A. been sought? ☐ Yes ☑ No
B. been obtained? ☐ Yes ☑ No

Is **oral argument** requested: ☑ Yes ☐ No
(requests for oral argument will not necessarily be granted)

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made **below**? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Has **argument** date of appeal been set? ☐ Yes ☑ No
If yes, enter date _____

Requested return date and explanation of emergency:

Signature of Moving Attorney:
/s/ [Illegible] **Date:** July 18, 2008

Has **service** been effected? ☑ Yes ☐ No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED** **DENIED.**

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____

By: _____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

L.A. AND G.A. ON THEIR OWN BEHALF AND AS PARENTS OF M.A.,	:	**DOCKET NO. 07-4329-CV**
Plaintiffs-Appellants,	:	
v.	:	
GRANBY BOARD OF EDUCATION,	:	
Defendant-Appellee.	:	**JULY 18, 2008**

DEFENDANT-APPELLEE'S MOTION TO DISMISS

RELIEF SOUGHT

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, as well as Rule 27 of the Local Rules of Appellate Procedure, the defendant-appellee, Granby Board of Education ["the Board"], hereby respectfully requests that the court dismiss the present appeal for lack of subject-matter jurisdiction. More specifically, the present matter is not an appeal from a "final decision" as is required under 28 U.S.C. §1291, nor does it fall within the ambit of the "collateral order doctrine." *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949). As such, the present appeal is not properly before this court. In short, the court lacks appellate jurisdiction, and the present appeal must be dismissed.

GROUNDS FOR SEEKING RELIEF

1. The present matter arises from the United States District Court for the District of Connecticut. It follows a prior appeal that came before this court under the following caption: *L.A. and G.A. on Their Own and as Parents of M.A. v. Granby Board of Education,* Docket No. 05-4168-cv. That original appeal challenged the trial court's dismissal of the plaintiffs-appellants' lawsuit for attorneys' fees and costs, which they had brought pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§1400 *et seq.* Following the submission of briefs and oral argument, this court 1) reversed the district court's June 30, 2005 judgment of dismissal; 2) vacated the district court's subsequent, and *sua sponte,* October 19, 2005 judgment, which – despite judgment having already been entered – dismissed the case on additional grounds; and 3) ordered expunged the *lis pendens* the trial court had ordered be placed on the plaintiffs' real property in favor of the plaintiffs' then-attorneys.

2. The case having been remanded, on or about June 14, 2007 the trial court directed the parties to submit status reports. The plaintiffs-appellants ["plaintiffs"] filed their status report on July 17, 2007, demanding that "the court grant them judgment as a matter of law." Brief for the Pro-Se Plaintiffs-Appellants ["Plaintiffs Brief"], p. 1. *See also* Appendix for the Pro Se Plaintiffs-Appellants ["P.A."] 21-22.

3. Due to difficulties with the district court's electronic filing system, the Board was obligated to manually file its July 20, 2007 status report on July 23, 2007. P.A. 26-29. The Board reasoned in its report that this court's decision did not disturb the trial court's finding that the plaintiffs engaged unfair, unreasonable, and inequitable behavior, and that based thereon, the trial court should deny the plaintiffs' demand for attorneys' fees and costs. P.A. 37-38. The Board further requested permission to file a motion pursuant to 20 U.S.C. §1415(i)(3)(B), seeking the reimbursement of its legal fees and costs. P.A. 38.

4. On July 23, 2007, the district court issued an order in which it declined to adopt the Board's request that the court deny the plaintiffs' demand for fees and costs and further denied, without prejudice, the Board's request to file its own motion for fees and costs. P.A. 42. The court further ordered the following:

> (1) [A]ll dispositive motions shall be filed on or before September 7, 2007; (2) if no dispositive motion is filed on or before September 7, 2007, the parties shall file their joint trial memorandum on or before October 1, 2007 and this case shall be trial ready in November 2007; (3) if a dispositive motion is filed, the court shall set the date for the filing of the joint trial memorandum and the trial date following the court's resolution of that dispositive motion.

Id.

5. On or about August 6, 2007, the plaintiffs filed a Motion for Reconsideration, requesting, somewhat peculiarly, that "the Order denying 'the Defendant's request to deny the plaintiffs' demand for fees and costs" be vacated. P.A. 44. Furthermore, the plaintiffs requested, *inter alia,* that the trial court "grant Judgment as a Matter of Law on Plaintiffs' Motion for Summary Judgment . . . or alternately, that the Court grant the Plaintiffs' Demand for Jury Trial, filed with this motion and dated August 6, 2007." P.A. 45. In support of that motion, the plaintiffs also filed a nine-page memorandum of law. P.A. 46-54.

6. On August 20, 2007, the district court issued a 22-page decision, denying the plaintiffs' reconsideration motion. In his decision, Judge Squatrito noted: "The court does not believe that the Plaintiffs fully understand what they are asking. **The Plaintiffs are asking the court to vacate those portions of an order that ruled in their favor.**" P.A. 82 (emphasis in original). The court further wrote:

> [T]he Plaintiffs appeared worried about the court's use of the term "terminated." "Terminated" in this context means that the Plaintiffs' first motion for summary judgment is no longer pending. . . . [T]he Plaintiffs seem to believe that "terminated" means they have either lost the opportunity to be heard on their summary judgment arguments, or that they have actually lost their summary judgment motion on the merits. Neither of these situations applies here because: (1) the court

> has not ruled on the merits of any summary judgment motion in this case; and (2) the court has provided a schedule for the filing of new summary judgment motions.

P.A. 83-84. The court then held: **"Because the schedule in the court's July 23, 2007 order remains in effect, the Plaintiffs and the Defendant may file summary judgment motions onor** [sic] **before September 7, 2007."** P.A. 87 (emphasis in original). Judge Squatrito reiterated that holding at the conclusion of his decision. P.A. 92.

7. Despite the unambiguous language of the court's Memorandum of Decision, specifically its holding that the briefing schedule for dispositive motions was still operative, that no ruling on the merits of the underlying case had been made, and that the plaintiffs still had the opportunity to be heard, on September 4, 2007, the plaintiffs filed what they entitled their "Amended Notice of Appeal." P.A. 70.

LEGAL AUTHORITY

It is evident from the documents contained in the plaintiffs' own appendix that the present appeal is premature. As Judge Squatrito expressly stated in his August 20, 2007 Memorandum of Decision, there has been no ruling on the actual merits of the underlying dispute. In fact, on July 23, 2007, the district court issued a briefing schedule for the filing of the parties' respective summary judgment motions, which

schedule it reiterated in its August 20 decision. Nonetheless, the plaintiffs filed the present appeal. It is not an appeal from a "final decision" as is required under 28 U.S.C. §1291.

Generally, an appeal may be taken only from a final decision. 28 U.S.C. § 1291. "The purpose of this rule "is to provide the parties with an opportunity for a single review of all the questions raised at the trial level . . . and thereby to avoid the waste of time and the delay in reaching trial finality which ensue when piecemeal appeals are permitted.'" *Nelson v. Unum Life Ins. Co. of America,* 468 F.3d 117, 119 (2nd Cir. 2006) (quoting *Paliaga v. Luckenbach S.S. Co.*, 301 F.2d 403, 406-07 (2nd Cir. 1962). A final order is one that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (quoting *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945)). In the present matter, the parties have not even filed dispositive motions. To the contrary, the plaintiffs have appealed a briefing schedule.

This appeals [sic] also does not fall within the parameters of the "collateral order doctrine." *See Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L.Ed. 1528 (1949). As this court has held, "[t]he collateral order doctrine is 'a narrow exception to the final order rule' that 'allows an appellate court to review immediately a district court order affecting rights that will be irretrievably lost in

the absence of an immediate appeal.'" *Wabtec Corp. v. Faiveley Transport Malmo AB*, 525 F.3d 135, 138 (2nd Cir. 2008) (quoting *United States v. Esposito,* 970 F.2d 1156, 1159 (2nd Cir. 1992)). "To fall within this '"small class" of decisions excepted from the final-judgment rule . . . , the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.'" *Wabtec Corp.,* 525 F.3d at 138 (quoting *Coopers & Lybrand,* 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)).

The present appeal does not satisfy any of those three criteria. Essentially, the plaintiffs seek to appeal from an order that simply established a briefing schedule and then, subsequently, a decision that denied the plaintiffs' request that the trial court reconsider its briefing schedule. By the plain and unambiguous language of Judge Squatrito's decision, there has been no determination – much less a conclusive one – of a disputed question, there has been no resolution of an important issue, and there is nothing that is unreviewable, because there is nothing to review. At best, this appeal is the consequence of a *pro se* party's misapprehension of the law. At worst, it is a continuation of the inequitable, bad faith conduct previously cited by the trial court and again noted in Judge Squatrito's August 20, 2007 Memorandum of Decision. P.A. 85. Regardless of the motivation, the present matter does not constitute an

appropriate appeal from a "final decision," and thus, it should be dismissed. *See* 28 U.S.C. §1291

CONCLUSION

THEREFORE, for the reasons set forth herein, the Board respectfully requests that this court dismiss the present appeal.

THE DEFENDANT-APPELLEE,
GRANBY BOARD OF EDUCATION

By /s/ Michael P. McKeon

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Facsimile: (860) 233-0516
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mmckeon@sscc-law.com

CERTIFICATION

This is to certify that a copy of the foregoing Defendant-Appellee's Motion to Dismiss will be sent via first-class mail, postage prepaid, on the 21st day of July 2008 to Lisa H. Anderson, Pro Se, and to Gordon N. Anderson, Pro Se, xxx xxx xxx, xxx, xxx xxx.

/s/ Michael P. McKeon
Michael P. McKeon

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

L.A. AND G.A. ON THEIR OWN BEHALF AND AS PARENTS OF M.A.,	:	**DOCKET NO. 07-4329-CV**
Plaintiffs-Appellants,	:	
v.	:	
GRANBY BOARD OF EDUCATION,	:	
Defendant-Appellee.	:	

AFFIDAVIT OF MICHAEL P. MCKEON

I, Michael P. McKeon, being duly sworn, do hereby depose and say:

1. I am over the age of eighteen and believe in the obligation of an oath.

2. I graduated from the University of Connecticut School of Law in May 1987, was admitted to the Connecticut bar in November 1987, and since then have practiced law continuously in the State of Connecticut.

3. I am admitted to practice law in the State of Connecticut, in the United States District Court for the District of Connecticut, the United States Court of Appeals for the Second Circuit, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court.

4. I represent the defendant-appellee, Granby Board of Education ["the Board"], in the above-captioned matter. It follows a prior appeal that came before this court under the following caption: *L.A. and G.A. on Their Own and as Parents of M.A. v. Granby Board of Education,* Docket No. 05-4168-cv. That original appeal challenged the trial court's dismissal of the plaintiffs-appellants' lawsuit for attorneys' fees and costs, which they had brought pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§1400 *et seq.* Following the submission of briefs and oral argument, this court 1) reversed the district court's June 30, 2005 judgment of dismissal; 2) vacated the district court's subsequent, and *sua sponte,* October 19, 2005 judgment, which – despite judgment having already been entered – dismissed the case on additional grounds; and 3) ordered expunged the *lis pendens* the trial court had ordered be placed on the plaintiffs' real property in favor of the plaintiffs' then-attorneys.

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report, I noted on behalf of the Board that as this court's decision did not disturb the trial court's finding that the plaintiffs engaged unfair, unreasonable, and inequitable behavior, the trial court should deny the plaintiffs' demand for attorneys' fees and costs. I further requested permission on the Board's behalf to file a motion pursuant to 20 U.S.C. §1415(i)(3)(B), seeking the reimbursement of its legal fees and costs.

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P.A. 83-84. The court then held: **"Because the schedule in the court's July 23, 2007 order**

remains in effect, the Plaintiffs and the Defendant may file summary judgment motions onor [sic] **before September 7, 2007."** P.A. 87 (emphasis in original). Judge Squatrito reiterated that holding at the conclusion of his decision. P.A. 92.

10. On September 4, 2007, the plaintiffs filed what they entitled their "Amended Notice of Appeal." P.A. 70.

/s/ Michael P. McKeon
Michael P. McKeon

Sworn to and subscribed before me on this 18th day of July 2008 in Hartford, Connecticut.

/s/ Brooke H. Sherer
Brooke H. Sherer
Commissioner of the
Superior Court

CERTIFICATION

This is to certify that a copy of the foregoing Affidavit of Michael P. McKeon will be sent via first-class mail, postage prepaid, on the 21st day of July 2008 to Lisa H. Anderson, Pro Se, and to Gordon N. Anderson, Pro Se, xxx xxx xxx, xxx, xxx xxx,

/s/ Michael P. McKeon
Michael P. McKeon

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 07-4329-cv

L.A. ON THEIR OWN BEHALF
AND AS PARENTS OF M.A.
G.A. ON THEIR OWN BEHALF
AND AS PARENTS OF M.A.,

Plaintiffs-Appellants,

v. **August 4, 2008**

GRANBY BOARD OF EDUCATION
Defendant-Appellee.

PLAINTIFFS-APPELLANTS' OPPOSITION STATEMENT IN RESPONSE TO DEFENDANTS-APPELLEE'S MOTION TO DISMISS

AND

PLAINTIFFS-APPELLANTS' REQUEST THAT THE ORDER OF JULY 28, 2008 EXTENDING THE FILING DATE OF THE APPELLEE BRIEF BE VACATED

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, as well as Rule 27 of the Local Rules of Appellate Procedure, the plaintiffs-appellants, pro se parents L.A. and G.A., hereby respectfully request that the court deny dismissal of the present appeal and vacate the order dated July 28, 2008 extending the filing date of the appellee brief.

The Motion to Dismiss Does Not Comply with the Federal and Local Rules of Appellate Procedure.

Appellee Granby Board of Education failed to comply with Local Rule 27(a)(1)(A) requiring moving parties to supply all of the information required by the "T-1080 Motion Information Statement". They failed to supply: the correct Caption/Short Title (A. v. Granby Bd of Ed); telephone and email information for the appellant (xxx-xxx-xxx, anderson999@att.net); and the Court-Judge appealed from (United States District Court for the District of Connecticut – Honorable Dominic J. Squatrito).

Omitting the name of the trial court judge is very important to the appellees because their motion seeks dismissal of this appeal based upon an alleged finding made by a magistrate judge who lacked jurisdiction to make findings. Jurisdiction by the magistrate judge is discussed in the "Brief for the Pro Se Plaintiffs-Appellants" (pages 11-14), later in this Opposition Statement and in affidavits filed in 2005 (PA 96, PA 98).

The rules also require that certain attachments be filed with motions, for example,

> "Required attachment to motion: . . . (b) If the motion seeks substantive relief, a copy of the lower court opinion or agency decision" – **Local Rule of Appellate Procedure 27(a)(1)(C)(viii)(b)**

Were the appellee to comply by providing the order as an attachment, and in its entirety as shown below,

the panel reviewing the motion to dismiss, would have known precisely what the trial court had ordered. And, it would have been more difficult to mislead the panel with such misrepresentions [sic] as, " . . . the present appeal is premature." (Motion p. 4) and "In the present matter, the parties have not even filed dispositive motions." (Motion p. 5).

The Order On Appeal,

"NOTICE OF ELECTRONIC ORDER. THIS IS THE ONLY NOTICE THE COURT SHALL ISSUE. The court has reviewed the status reports submitted by the parties. In light of the Summary Order of the U.S. Court of Appeals for the Second Circuit: (1) the Defendant's request to deny the Plaintiffs' demand for fees and costs is DENIED; and (2) the Defendant's request for permission to file a motion pursuant to 20 U.S.C. S 1415(i)(3)(B) is DENIED without prejudice. In their Status Report, the Plaintiffs represent that they have a motion for summary judgment (dkt. # 16) pending before the court. The court notes, however, that all pending motions, including the Plaintiffs' motion for summary judgment (dkt # 16), were terminated once this case was dismissed. Nevertheless, in the interest of fairness, the court shall allow the parties to re-file their dispositive motions. Therefore, the court ORDERS the following: (1) all dispositive motions shall be filed on or before September 7, 2007; (2) if no dispositive motion is filed on or before September 7, 2007, the parties shall file their joint trial memorandum on or before October 1, 2007 and this case shall be trial ready in November

> 2007; (3) if a dispositive motion is filed, the court shall set the date for the filing of the joint trial memorandum and the trial date following the court's resolution of that dispositive motion. IT IS SO ORDERED. Signed by Judge Dominic J. Squatrito on 07/23/07. (S-Ring, P.) (Entered: 07/23/2007)" **Order Doc #57, PA-25**

Considering the order on appeal, shown above, it is unlikely that the pro se parents would have realized that the order made a *final* disposition of all of their federal claims, or, that "re-filing" the same motion is precluded by Fed. R. Civ. P. 41(b) as explained in the "Brief for the Pro Se Plaintiff-Appellants". Nevertheless, a Notice of Appeal (PA 41) was timely-filed, preserving the *final* disposition of the Plaintiffs' Motion for Summary Judgment (Doc #16, PA 100) for appellate review. A hard copy of the Notice of Appeal (with the order as a required attachment) is appended hereto for the convenience of this court.

As the motion fails to comply with federal rules and misrepresents the order that is being appealed, the "Defendant-Appellee's Motion to Dismiss" must be denied.

The Motion to Dismiss Misrepresents the Trial Court Finding.

The appellee references,

> "the trial court's finding that the plaintiffs engaged in unfair, unreasonable, and inequitable behavior". **(Motion p. 2)**

This alleged "finding" concerning the appellants' behavior is discussed in the "Brief for the Plaintiff-Appellants". Granby Board of Education failed to file an appellee brief, and therefore, should not be permitted to repeatedly denigrate the appellants or raise the issue of the appellants' behavior in their motion papers.

The appellants respectfully ask that the court consider the following points relative to the alleged "finding" included in the motion to dismiss:

1) The Article III Judge assigned to the case below has never witnessed *any* behavior on the part of the appellants, and the appellants did not consent to jurisdiction by a magistrate judge. (Order of Reference PA 94 with unsigned attachment – Notice of Availability of a U.S. Magistrate Judge PA 95, Affidavits PA 96-97, PA 98-99)

2) Federal Rule of Evidence 605 provides an automatic objection to witness testimony by a judge presiding at the trial. The appellee has stated that,

> "the trial court's finding that the plaintiffs engaged in unfair, unreasonable, and inequitable behavior" (Motion p. 2)

was made by the magistrate judge who presided over a brief settlement conference. (Def. Status Rpt., PA 36). The appellants respectfully assert, that as presider, the magistrate judge may not provide witness testimony. His role as presider over the settlement conference, and pursuant to the rules cited by the "Brief for the Pro Se Plaintiffs-Appellants" (Brief p. 11-15), allowed no additional involvement by the magistrate judge beyond reporting to the clerk that, "The case did not settle." The magistrate made this report on April 7, 2005 (Minute Entry, PA 13). The settlement conference is the only time that the appellants have appeared before the magistrate judge.

3) Federal Rule of Evidence 408 provides that "conduct and statements made in compromise negotiations regarding the claim" are not admissible. Accordingly,

> "the trial court's finding that the plaintiffs engaged in unfair, unreasonable, and inequitable behavior"

as alleged in the motion to dismiss **(Motion, p 2)**, is not sufficient to defeat "Plaintiffs' Motion for Summary Judgment" that has been pending in district court since April of 2004. (PA-100). Likewise under this rule of evidence, and additional to reasons set forth in the "Brief for Pro Se Plaintiffs-Appellants, the alleged "finding" is insufficient as a basis for dismissing this appeal.

The "Defendant-Appellee's Motion To Dismiss" must be denied.

The Appellee Forfeited the Right To Make The Arguments in the Motion, by Failing to File an Appellee Brief.

The "Defendant-Appellee's Motion to Dismiss" sets forth a version of this case that does not comport with the Jurisdictional Statement, Statement of the Issues, Statement of the Case, Statement of the Facts and Argument, and Conclusion as carefully briefed and timely-filed in the "Brief for the Pro Se Plaintiffs-Appellants". Federal rules and this court's "Scheduling Order #1" afforded sufficient notice and opportunity for the appellee to be heard on matters raised in the appellants' brief. Appellants assert that the discrepancies between the points made in the motion to dismiss, and information in the "Brief for the Pro Se Plaintiffs-Appellants,' must be resolved to agree with the appellant brief, as the content of the brief is properly before this court. Further the appellee's failure to respond forthrightly by filing an appellee brief must not be rewarded. The allowance of the arguments in the motion papers is prejudicial to the appellants – who have followed all orders and rules – and, allowing the arguments in the motion papers, creates confusion and delay in resolving this case.

As the motion to dismiss contains arguments that must have been made previously in accordance with Scheduling Order #1, but were not, the "Defendant-Appellee's Motion to Dismiss" must be denied. As the motion contains arguments that must have been made previously, within the timeframe and in the format specified by Federal Rules and Local Rules

of Appellate Procedure, but were not, the "Defendant-Appellee's Motion to Dismiss" must be denied. As the motion contains arguments that must have been properly noticed, and, to which appellants must have had a full and fair opportunity to respond as afforded by Federal and Local Rules, but were not, the "Defendant-Appellee's Motion to Dismiss" must be denied.

The Assertion that This Court Lacks Appellate Jurisdiction Is Incorrect

The appellee contends that this appeal should be dismissed because it "is not an appeal from a 'final decision' as is required under 28 U.S. S 1291" **(Motion, p 4)**. They contend in the motion papers that the appellants are "essentially" appealing a scheduling order, that the parties have yet to file dispositive motions, and that the trial court had not issued a judgment on the merits. None of this is true. (See "Brief of the Pro Se Plaintiffs-Appellants" Jurisdictional Statement)

Though the trial court issued a lengthy Memorandum of Decision and Order **(PA 72-93)** in response to the Plaintiffs Motion for Reconsideration (PA 44-45), the decision and order failed, to mention the trial court's disposition of the "Plaintiffs Motion for Summary Judgment" (Doc#16, PA 100). The disposition has yet to be set forth in a separate document, but this has no effect on the *finality* of that disposition as

expressed in the trial court order dated July 23, 2007 (Doc #57, PA 25. attached hereto).

> "A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order." – **Federal Rules of Appellate Procedure 4(a)(7)(B)**

Rule 4(a)(7) concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387, (1978) (per curiam), the Supreme Court held that, "parties to an appeal may waive the separate judgment requirement of Fed. R. Civ. P. 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58 Id. Thus, the parties can choose to appeal without waiting for the order to be set forth on a separate document.

Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without waiting

for the judgment or order to be set forth on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay.

Holding true to form, the appellee has used the motion papers to cause confusion and delay. They have misrepresented the issues that the appellants have preserved for appeal, and then argued based upon those misrepresentations, that this court lacks appellate jurisdiction.

> "NOTICE OF ELECTRONIC ORDER. THIS IS THE ONLY NOTICE THE COURT SHALL ISSUE. The court has reviewed the status reports submitted by the parties. In light of the Summary Order of the U.S. Court of Appeals for the Second Circuit: (1) the Defendant's request to deny the Plaintiffs' demand for fees and costs is DENIED; and (2) the Defendant's request for permission to file a motion pursuant to 20 U.S.C. S 1415(i)(3)(B) is DENIED without prejudice. In their Status Report, the Plaintiffs represent that they have a motion for summary judgment (dkt. # 16) pending before the court. The court notes, however, that all pending motions, including the Plaintiffs' motion for summary judgment (dkt # 16), were terminated once this case was dismissed. Nevertheless, in the interest of fairness, the court shall allow the parties to refile their dispositive motions. Therefore, the court ORDERS the following: (1) all dispositive motions shall be filed on or before

> September 7, 2007; (2) if no dispositive motion is filed on or before September 7, 2007, the parties shall file their joint trial memorandum on or before October 1, 2007 and this case shall be trial ready in November 2007; (3) if a dispositive motion is filed, the court shall set the date for the filing of the joint trial memorandum and the trial date following the court's resolution of that dispositive motion. IT IS SO ORDERED. Signed by Judge Dominic J. Squatrito on 07/23/07. (S-Ring, P.) (Entered: 07/23/2007)" **Order Doc #57, PA-25**

In its July 23, 2007 order shown above, the trial court clearly evidenced that the Plaintiffs' Motion for Summary Judgment, incorporating all of their federal claims, had been resolved without an award of the relief sought. Further in their motion to dismiss, the appellee quotes the trial court's August 20, 2007 decision as stating, "(2) the court has provided a schedule for the filing of *new* [emphasis added] summary judgment motions." (Motion p. 3) Appellants explained in their brief that, Fed. R. Civ. P. 41(b) precludes them from "re-filing" their *old* motion for summary judgment, because that motion, from April of 2004, had already been adjudicated as announced and evidenced in the trial court's July 23, 2007 order shown above. (Doc #57, PA-25).

By timely-filing their Notice of Appeal relative to the July 23, 2007 order, the appellants preserved the trial court's final disposition of "Plaintiffs' Motion for Summary Judgment" as a matter for appeal. The

appellants respectfully assert that the "Brief for the Pro Se Plaintiffs-Appellants" sets forth this argument in a clear, forthright and lawful manner, and that misrepresentations espoused by in the appellee's motion papers are designed to confuse this court and create delay. Because the motion makes misrepresentations to this court and asserts that this court lacks appellate jurisdiction, the "Defendant-Appellee's Motion to Dismiss" must be denied.

The Appellate Court Can Reach the Merits and Make a Final Decision.

The Plaintiffs-Appellants earned the following result in their prior appeal to this court.

> **"UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the June 30, 2005 judgment of the District Court be REVERSED, the October 19, 2005 judgment of the District Court be VACATED, and the *lis pendens* entered on April 7, 2005 be EXPUNGED." Sum. Order USCA #05-4168-cv, PA-3**

This court expressed concern about the first dismissal of the trial court case, stating,

> "The magistrate dismissed the complaint with prejudice.[4] We have long held that "outright dismissal for reasons not going to the merits is viewed with disfavor in the federal courts." *Nagler v. Admiral Corp.*, 248 F.2d 319, 322 (2d Cir. 1957); *see also Stern v. General Elec. Co.*, 924

> F.2d 472, 477 (2d Cir. 1991). The court erred in dismissing Plaintiffs' case with prejudice . . . "
>
> 'A court may, under Federal Rule of Civil Procedure 41(b), dismiss a claim if a plaintiff does not comply with the Federal Rules or an order of the courts. However, the magistrate neither cited this statute in his April Report nor did he find that Plaintiffs failed to comply with the Rules or any of his orders." (Summary Order, PA-8)

The second dismissal from which this appeal is taken, neither cites disobedience or noncompliance on the part of the appellants, nor states otherwise the basis for retiring the "Plaintiffs' Motion for Summary Judgment" filed in April of 2004 (Doc#16, PA 100). As shown in the "Brief for the Pro Se Plaintiffs-Appellants" (page 6),

> " . . . Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule – except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 – operates as an adjudication on the merits." – Fed. R. Civ. P. 41(b)

In it's order of July 23, 2007, the trial court made "an adjudication on the merits", permitting this appellate court to consider the merits and render a decision in this case. Dismissing this appeal will delay final resolution by returning this case to trial court *for a third time*. In the interest of justice and expediency, the "Defendant-Appellee's Motion to Dismiss" must be denied.

PLAINTIFFS-APPELLANTS' REQUEST THAT THE ORDER OF JULY 28, 2008 EXTENDING THE FILING DATE OF THE APPELLEE BRIEF BE VACATED

The Granby Board of Education failed to comply with Scheduling Order #1, requiring that the appellee brief be filed by April 17, 2008. They failed to respond to successive letters from the court dated May 1, 2008 and June 26, 2008, "requesting a response in regards to filing a brief". On June 25, 2008, the court sent Local Rule 34 questionnaires to the parties, indicating that the time for filing briefs had passed.

> "**Pro Se Appeals.** For an appeal in which at least one party appears pro se: after the due date of the last brief, the Clerk of the Court will mail to each party a questionnaire asking whether the party would like to have the case decided on the briefs, or whether the party seeks oral argument. All parties must return the questionnaire within 14 days of its date. Failure by a party to timely return the questionnaire will be deemed to mean that the party does not seek oral argument. – **Local Rule of Appellate Procedure 34(a)(3)**

The appellees failed to respond, indicating they do no [sic] seek oral argument. This case had become available for argument calendaring. Now, the case has been removed from argument calendaring due to the appellee's latest delay tactics – the "Defendant-Appellee's Motion to Dismiss" opposed herein, and the "Defendant-Appellee's Motion to Extend Filing Date of Brief" that was granted on July 28, 2008.

Persistent lack of responsiveness on the part of the appellee evidences that they are intentionally causing confusion and delay. They have been shameless in their consumption of judicial resources and in thwarting adjudication of the claims that the appellants made in October of 2003 (Doc. #1 Complaint, PA 130). They have failed to respond to or controvert "Plaintiffs' Motion for Summary Judgment" that was filed in April of 2004. (PA 100) Their conduct resulted an appeal where this court decided in favor of the pro se parents/appellants, and REVERSED, VACATED AND EXPUNGED the first set of trial court orders (USCA Mandate 05-4168-cv, PA 1). They failed to act forthrightly upon remand to district court, necessitating a return to the Second Circuit in the present matter, 07-4329-cv. And incredibly, they failed to file an appellee brief!

In their motion to extend the filing date, appellees assert,

> "9. Extending the filing date until one month after this court rules on the Board's Motion to Dismiss will allow the Board to avoid what could be the unnecessary expenditure of time and financial resources that is inherent in the drafting and filing of an appellate brief. If this court grants the Board's dismissal motion, there obviously will be no need for the Board to file a brief. If the court denies the Motion to Dismiss, the Board will then be able to fully address the issues raised in the present appeal." (Motion to Extend Filing Date p. 4)

The appellants urgently submit that the Federal Rules of Appellate Procedure, the Local Rules, and the Orders of this Court provide the parties "to fully address the issues raised in the present appeal." Had the appellees complied with the rules and orders, this appeal would not have been stalled.

The plaintiffs-appellants – who, given their pro se status, rely heavily on the due process of law and the rules of procedure in conducting themselves respectfully and capably in court – would prefer to be discussing substantive matters. But sadly, after 4+ years, there is nothing in the court record to indicate that anyone has even read the "Plaintiffs Motion for Summery [sic] Judgment" (PA 100), and the district court has yet to make *any* findings.

Further, the burdens of this litigation . . . suffering a $65,000.00 *lis pendens* on their home, waiting and wondering as the defendant realized a shocking number of filing extensions, enduring denigrating misrepresentations concerning their behavior, being arrested (temporally, geographically, intellectually, legally, emotionally, physically, educationally, socially, financially), and, in simply failing to get the court's attention for this uncontroverted summary judgment motion that turns on established rights and important public interests . . . (the burdens) have been terrifying.

Therefore, in the interest of justice and with respect for this court and for the federal rules, and also, for reasons set forth in the opposition statement

concerning the appellee's motion to dismiss, the order of July 28, 2008, extending the filing date of the appellee brief must be vacated.

CONCLUSION

THEREFORE, for the reasons set forth herein, the pro se Appellants respectfully request that this court deny "Defendant-Appellee's Motion to Dismiss" and vacate the order, dated July 28, 2008, extending the filing date of the appellee brief.

THE PLAINTIFFS-APPELLANTS,

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[Attachments Omitted In Printing]